TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 372

THE CITY OF CINCINNATI, PETITIONER,
vs.
MARGARET W. VESTER

No. 373

THE CITY OF CINCINNATI, PETITIONER,
vs.
JAMES S. RICHARDS AND PASCHAL L. RICHARDS

No. 374

THE CITY OF CINCINNATI, PETITIONER,
vs.
LLEWELLYN B. REAKIRT

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,503, 34,504, 34,505)

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DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Margaret W. Vester,
Plaintiff,
vs.
The City of Cincinnati,
a municipal corporation
under the laws of Ohio,
Defendant.

In Equity
No. 555

AMENDED BILL—Filed Oct. 29, 1928. Harry F. Rabe, Clerk.

Now comes the plaintiff and says that the defendant is a municipal ocrporation under the laws of Ohio; that the amount in controversy herein is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that this controversy arises under and upon the Fourteenth Amendment to the Constitution of the United States of America, upon which palintiff bases this action, and that the jurisdiction of this federal court is invoked upon that ground.

Plaintiff says that she is the owner of a tract of land in the City of Cincinnati, Hamilton County, Ohio, 27 feet front on the east side of Broadway, 44 feet south of Fifth Street, extending east parallel with Fifth Street between parallel lines 90 feet, containing a three story brick occupied by a physician's office and dwelling rooms, known as No. 426 Broadway; that the defendant, the City of Cincinnati, on July 6th, 1927, passed a certain resolution declaring its intent to appropriate for street widening purposes a strip of land 25 feet wide adjacent to the south line of Fifth Street easterly from the east line of Main Street to the west line of Pike Street, a distance of about five blocks intersected (from west to east) by Lawson Alley, Sycamore Street, Broadway, McAllister Street, for the purpose of widening said Fifth Street 25 feet, and at the same time declared its intent to appropriate certain other lands in excess of the above described property necessary for said street widening, including a tract of land next adjacent thereto approximately 75 wide and extending all the way from Broadway easterly to the next street on the east, known as McAllister Street, and which includes the aforesaid property of plaintiff, said resolution being entitled, "A Resolution declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement."

By Section 3 of said resolution the Council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and preservation of said public use, but no public use of said excess is specified or stated.

Thereafter, upon March 21st, 1928, the defendant, by its Council, passed an ordinance to appropriate and did attempt to appropriate said property in accordance with said resolution, stating that said excess condemnation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use", and did order the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of this plaintiff, as aforesaid, and thereupon the said City Solicitor did on May 4th, 1928, file an application in the Court of Common Pleas of Hamilton County, Ohio, in a case entitled The City of Cincinnati vs. Sarah Smythe, et al, being case numbered A 8538 on the docket of said court, to assess compensation, and did cause notice to be issued to the various property holders, including this plaintiff, thereof and has caused the said case to be set down for trial on or about the 17th day of September, 1928.

The property above described sought to be appropriated from this plaintiff is not within the limitation of the 25 foot strip aforesaid desired for the widening of Fifth Street, nor will it abut upon said street as widened; but that it will be separated from said widened street by an intervening lot nineteen (19) feet wide now owned by another person.

Plaintiff says that her said property is not taken for any public use; that the said resolution declaring the intent of the city expressly recites that the same is not necessary for said street widening, and that the same is "in excess of that actually to be occupied by said improvement"; that no public use whatsoever to be made of said property has been stated by the defendant, and that the action of the defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made, and said property is taken for the purpose and with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated. The Charter of the City of Cincinnati is silent upon and does not purport to authorize any such excess condemnation.

The proposed taking of plaintiff's property constitutes a taking of said property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which this plaintiff invokes.

Plaintiff further says that the area of the property attempted to be taken by way of excess condemnation south of said twenty-five (25) foot strip is not uniform in depth and is laid out in accordance with no uniform rule, and that the lots embraced therein are of no uniform area, dimensions, or classification; that in some instances lands adjacent to the proposed improvement are omitted and in other lands are taken to unequal depths. From Main Street to Lawson Alley the property taken by way of excess condemnation is seventy-five and 40/100 (75.40) feet deep; from Lawson Alley to Sycamore Street the same is one hundred and twenty-four and 67/100 (124.67) feet in depth; from Sycamore Street to Broadway no property whatever is taken by way of excess condemnation, the property being left undisturbed in possession of present owners.

Plaintiff further says that whereas the property of the plaintiff lying forty-four (44) feet south of Fifth Street, fronting on the east side of Broadway, as aforesaid, is taken by way of excess condemnation, yet the property directly across and on the west side of Broadway equally distant from the improvement is not so taken.

Between Broadway and McAllister Street and also between Lawrence and Pike Streets the property taken by way of excess condemnation is about seventy-five (75) feet in depth, but between McAllister Street and Lawrence Street no property whatever is so taken, the same being left in the possession of its present owners.

While said property so taken by way of excess condemnation is taken with expectation and purpose on the part of the defendant that the increase in the value of same, including plaintiff's property and other properties similarly situated, which may accrue to the city by reason of the widening of Fifth Street, upon a resale will repay to the city the cost of making the said widening, yet the property upon the north side of Fifth Street between Main Street and Pike Street and the property immediately north thereof which is in its general character and condition, and for the most part in its improvement similar to that upon the south side of Fifth Street and will receive whatever benefits, if any, result from said street widening equally with the property on the south is nevertheless to be permitted to remain undisturbed in private ownership.

Plaintiff says that the classification of the lands so subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others within the area of the proposed excess condemnation in favor of lands similarly situated and equally distant from the same, and that the plaintiff is thereby denied the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, which the plaintiff invokes in this behalf.

Plaintiff further says that by the laws of Ohio (General Code Section 3679) in order to warrant the appropriation of private property by municipal corporations it is necessary said corporation should by resolution define the purpose of the appropriation; that the defendant never has defined the purpose of this excess appropriation by resolution. That it is necessary under the laws of Ohio that the application for the assessment of compensation disclose the object proposed to be accomplished by such appropriation, but that the application filed by defendant in the Court of Common Pleas to appropriate said property fails to make any other disclosure of the object of said appropriation of the property in question than to say that the same is taken in furtherance of the public use of widening Fifth Street "by way of excess appropriation in accordance with the provision of Article XVIII, Section 10, of the Constitution of Ohio."

Plaintiff says that notwithstanding the unconstitutionality, illegality, and insufficiency of attempted appropriation the plaintiff is, under the laws of Ohio and the decisions of its Supreme Court, without any adequate remedy at law that can be asserted either in response to said application to assess compensation or otherwise.

Plaintiff further says that the said resolution so declaring the intent to appropriate said property was passed upon July 6th, 1927; that the property of this plaintiff has been kept under appropriation proceedings, unconstitutional and invalid for the reasons hereinabove set forth, now for more than one year last past; that its marketability and availability for improvement and value have been thus impaired, and that the plaintiff has suffered, is suffering and will suffer great injury, for all of which she is without adequate remedy at law, and her said injury is and will be irremediable unless the said appropriation acts herein complained of are enjoined by this honorable court.

Wherefore, the plaintiff prays that the defendant be perpetually enjoined from proceeding with said excess condemnation or from appropriating any part of this plaintiff's property except that actually desired for the widening of Fifth Street and within the 25 foot strip aforesaid, for a temporary injunction pending the hearing of this cause, and for all such other, further and general relief as plaintiff is in equity entitled to receive.

Peck, Shaffer & Williams,
Attorneys for Plaintiff.

State of Ohio, }
Hamilton County. } ss.

Margaret W. Vester, being first duly sworn, deposes and says that she is the plaintiff in the above entitled action and that the facts set forth in the foregoing Amended Bill are true.

Margaret W. Vester.

Sworn to before me and subscribed in my presence this 27th day of October, 1928.

Walter C. Kister,
Notary Public, Hamilton County, Ohio.

File
Hickenlooper, J.
(Seal)

STIPULATION—Filed Nov. 10, 1928.

It is stipulated that the following correction may be made on the face of the bill:

Page four, second whole paragraph, line four, change "width" to "depth";

Sixth line from the end of paragraph change "wide" to "deep":

Fourth line from the end of same paragraph change "width" to "depth";

Page five, first paragraph, line three, change "width" to "depth".

Approved,
Hickenlooper, J.

Peck, Shaffer & Williams,
Attorneys for plaintiff.
John D. Ellis,
Attorney for defendant.

ANSWER TO AMENDED BILL—Filed Nov. 20, 1928.

Now comes defendant, the city of Cincinnati, and for answer to amended bill filed herein, admits that it is a municipal corporation under the laws of Ohio; that the amount in controversy herein is in excess of Three thousand dollars ($3,000.00), exclusive of interest and costs; that plaintiff is the owner of a tract of land on the east side of Broadway, as described in the petition; that the city of Cincinnati on July 6, 1927, passed a resolution declaring its intent to appropriate for street widening purposes a strip of land 25 feet wide adjacent to the south line of Fifth Street, from the east line of Main Street to the west line of Pike Street and at the same time declared its intent to appropriate certain other lands in excess of said 25 foot strip including a tract of land fronting approximately 75 feet on Broadway and extending eastwardly to McAllister Street, including the said property of plaintiff, the said resolution being entitled as set forth in said amended bill; that in Section 3 of said resolution council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and preservation of said public use, that thereafter on March 21, 1928, council passed an ordinance to appropriate said property among other properties, in accordance with said resolution, stating that said excess appropriation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use" and ordered the city solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of plaintiff, as aforesaid; that thereafter on May 4, 1928, the city solicitor filed an application in the common pleas court of Hamilton County, to wit: City versus Smythe, et al, No. A-8538, and caused notice to be issued to the various property holders, including plaintiff, and that the hearing at the time of the filing of petition herein had been set for September 17, 1928.

Defendant further admits that the property of plaintiff as appropriated by defendant is not within the limitation of the 25 foot strip desired for the widening of Fifth Street; that it will not abut upon said street as widened and that it will be separated from said widened street by a strip of land nineteen (19) feet wide now owned by another person, that the said property is in excess of that actually to be occupied by said improvement of Fifth Street; that the charter of the city of Cincinnati makes no reference to the subject or condemnation or excess condemnation; that the excess property appropriated south of the twenty-five foot strip is not uniform in depth; that the area of said excess appropriation is as stated in the amended bill; that no property on the north side of Fifth Street has been appropriated.

Defendant denies that said property is not taken for any public use and that no public use is stated in the resolution and ordinance providing for said appropriation; that the action of defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made; that the proposed taking of plaintiff's property constitutes a taking of the said property without due process of law, contrary to the 14th Amendment of the Constitution of the United States; that the excess property is laid out in accordance with no uniform rule; that the classification of the lands subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others; that plaintiff is by said proceedings denied the equal protection of the laws; that said proceedings are contrary to the laws of Ohio; that plaintiff has suffered, is suffering and will suffer great injury by reason of the proceedings of the city of Cincinnati by way of appropriation or excess appropriation.

Further answering, defendant says that the two squares of Fifth Street west of Main Street, to wit: Government Square and Fountain Square, are in the heart of the city of Cincinnati and that a large amount of traffic comes into said squares and proceeds eastwardly over Fifth Street. The width of Fifth Street in the two squares west of Main Street is 130 feet from property line to property line; the width of Fifth Street east of Main Street is 66 feet, from property line to property line. Defendant says that it proposes to widen Fifth Street from Main Street eastwardly to Pike Street to a total width of 91 feet by appropriating 25 feet on the south side of Fifth Street for street purposes.

Defendant says that after said Fifth Street from Main Street to Pike Street shall have been improved to its new width, it will be the widest and most imposing of the city's streets in the present main business district. The buildings at present existing along said south side of Fifth Street, with the exception of the Masonic Temple from Sycamore Street to Broadway, and the Fontbonne building from McAllister Street to Lawrence Street, (which said buildings have been set back to conform to the new street width) are almost without exception of great age and not capable of being used or remodeled in a manner suited to the proposed broad highway, particularly in view of the fact that nearly all the parcels of real estate along said south side of Fifth Street from Main Street to Pike Street are of small size and frontage.

Defendant says that it has appropriated in their entirety all the parcels fronting on Fifth Street from Main Street to Pike Street with the exception of said Masonic Temple property and Fontbonne property, heretofore referred to, and in addition, three tracts fronting on the east side of Broadway lying within 100 feet of Fifth Street, and two tracts on the west side of Pike Street, lying within 100 feet of Fifth Street. Defendant says that in so doing, it is operation under the provisions of Section 10 of Article XVIII of the Constitution of Ohio, as follows:

> "Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

Defendant says that by applying the principle of excess condemnation as herein proposed, it will be able to further the appropriate development of Fifth Street from Main Street to Pike Street as a notable highway in the city of Cincinnati. Defendant says that by using the powers conferred by said Section 10 of Article XVIII of the Constitution of Ohio, it will be able after said widening has become effective, to dispose of lots of land of such size and subject to such restrictions as shall be best suited to the new highway.

Defendant says that plaintiff's lot lies parallel with Fifth Street at a distance of 44 feet from the existing south line of Fifth Street, and at a distance of 19 feet from the proposed new south line of Fifth Street, as shown by blueprint plat hereto attached, marked "Exhibit A". Defendant says that after the widening of Fifth Street, the southeast corner of Fifth Street and Broadway will be a prominent corner in the city of Cincinnati, fitted to be the site of a large and attractive public or private building, or of some other important public or private use. Defendant says that said strip of 19 feet between plaintiff's north line and the new south line of Fifth Street will be incapable of development by itself as a suitable lot for the erection of a building worthy of the corner it will occupy.

Defendant further says that the building of plaintiff on her said lot is an old building not suited to its location under existing conditions and utterly unsuited for the situation after Fifth Street shall have been widened. Defendant says that at the present time, the said building is incapable of producing a reasonable income on its present market value, which market value is purely speculative and founded on the hope that some corporation or individual will at some time in the future find it necessary or profitable to buy out plaintiff and a sufficient number of her neighbors to provide an adequate building site.

Defendant further says that by means of its control of the said parcels appropriated between Broadway and McAllister Street, it will be able to assist in the appropriate development of said territory, whereas, if the said development is left to the hazard or private bargaining involving a large number of private interests, the appropriate development of said tract from Broadway to McAllister Street is likely to be delayed for a long period of time or made impossible.

Defendant further says that the present reasonable market value of the property of plaintiff described in the petition under the conditions at present existing is the sum of Forty-six thousand six hundred dollars ($46,600.-00). Defendant says that after the widening of said Fifth Street is completed, the said property will have a reasonable market value very much in excess of said sum of Forty-six thousand six hundred dollars ($46,600.-00). The increase in said market value will be due entirely to the new conditions created by the widening of Fifth Street and the proposed appropriation.

Defendant says that by paiyng plaintiff the reasonable value of her said property, as described in the petition, plaintiff will be deprived of no constitutional rights nor of any other right except the right of delay or make impossible the appropriate development of said property between Broadway and McAllister Street in accordance with the needs of business, industry and the public.

In conclusion the city of Cincinnati expects two things in connection with the application of the principle of excess condemnation of the plaintiff's property and to other property along the south side of Fifth Street from Main Street to Pike Street, to wit:

> 1st—That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets by using or disposing of its excess in tracts of such size and with such size and with such restrictions as will inure to the public advantage.
>
> 2nd—That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effecting the improvement.

Wherefore, defendant prays that the petition of plaintiff may be dismissed at her costs and that defendant may go hence without day.

City of Cincinnati,
By John D. Ellis,
City Solicitor,
By Ed. F. Alexander,
Assistant City Solicitor.

State of Ohio,
County of Hamilton. } ss.

JOHN D. ELLIS, being first duly sworn, says that he is the city solicitor of the city of Cincinnati, and that the facts set forth in the foregoing answer are true, as he verily believes.

John D. Ellis.

Sworn to and subscribed to before me this 20th day of November A. D. 1928.
(Seal)
Bess Argo
Notary Public, Hamilton County, Ohio.

NARRATIVE STATEMENT OF EVIDENCE IN NOS. 555, 556 AND 557—Filed Jan. 7, 1929.

Appearances:

Mr. John Weld Peck, on behalf of plaintiffs.

Messrs. John D. Ellis, City Solicitor, and

Ed. F. Alexander, Assistant Solicitor, on behalf of defendant.

The above entitled causes were heard together and evidence taken before Honorable Smith Hickenlooper,

John W. Vester

Judge of the District Court of the Southern District of Ohio, on November 23, 1928, as follows:

JOHN W. VESTER: I live at 2235 Burnet Avenue, Mt. Auburn, and am the husband of the plaintiff in this case, Margaret W. Vester. She is the owner of the property in question in this bill which is 27 feet front on the east side of Broadway and lies 44 feet south of Fifth street. I am also the owner of the drug store at the corner of Fifth & Broadway, but that is not the property involved in this case. My wife's property is a residence building occupied by a physician, my son, on the first floor. It is suitable for the purposes of a physician's office and has been built for that purpose. The lower floor has been occupied as a physician's office for the last ten or twelve years. My son is in the active practice of medicine; he is a member of the staff of the Good Samaritan Hospital and a general practitioner and surgeon. He desires to remain in this property. I make no objection to the widening of Fifth Street as such, that is to the condemnation of a 25 foot strip on the south side of Fifth Street. The south line of Fifth Street as widened will be 18 feet from the north line of my wife's property.

> Plaintiff here offered in evidence, a plat of the property to be condemned marked "Plaintiff's Exhibit Number 1."

Between my wife's property and the corner property, there is a building occupied by Dr. Joseph Podesta. There is a space on each side of my wife's property so that it is not physically joined to the Podesta property. At the southwest corner of Fifth and Broadway is the John Van Range Company building. That building was formerly occupied as a manufacturing site and is now offered for rent as a loft building or offices to be remodeled to suit the tenant. The sign in the window of the building says that it is offered for long or short term lease for offices or loft. This building was formerly occupied as a manufacturing building and sales room by the John Van Range Company who are manufacturers of hotel equipment and kitchen utensils.

The property on the south side of Fifth Street is perfectly level. To the best of my memory my wife has owned her property for twelve or fifteen years and my drug store has been located at the nearby corner for twenty-eight years. The property on the north side of the street is level. Recently there have been a few buildings put up on the north side of Fifth Street but otherwise the buildings on that side are about the same as those on the south side, and the property generally is about the same thing except where new buildings have been put up. The Masonic Temple Building is west of and immediately adjacent to building of the John Van Range Company. The Masonic Temple Building is new.

Cross-examination:

I do not know who owns the John Van Range Company building. I have noticed the character of the walls of that building; they are made of concrete—I saw the building put up.

My son has occupied the office in my wife's building I think going on three years; prior to that it was occupied by Dr. Spargur and Dr. Davis. Dr. Spargur became ill and had to give up the building and my son succeeded him. The other doctor did not care to take it over.

Q. What rental did you receive from that property before your son occupied it?

Objection by counsel for plaintiff was sustained by the court and an exception reserved by counsel for the defendant.

It was agreed by counsel for the plaintiff and the defendant referring to plaintiff's exhibit No. 1, that the key located at the lower right hand side of the plat offered in evidence may be considered as part of the evidence and that the figures on the plat for frontages refer to feet and one-hundredths part of feet; that the shaded portions of said plat indicate the part occupied by buildings that is that the shaded portions included within lines indicate the buildings; that no property is being taken by way of excess condemnation between Sycamore Street and Broadway; that no property is being taken by way of excess condemnation between McAllister and Lawrence; that as for the rest of the appropriation the south boundary of the excess condemnation is the south boundary of the part which is marked with diagonal lines in accordance with the key on plaintiff's exhibit No. 1.

JUDGE PECK: "That is the only separate evidence which I care to offer for Mr. Vester".

JAMES S. RICHARDS: I live at 1302 Edwards Road, Hyde Park. I am a member of the bar, but do not practice. I and my brother are the owners of the leasehold estate set forth in my bill. We have a lease for a term of years giving the privilege of purchase at a certain price.

Our property lies 61 feet west of Pike street on the south side of Fifth Street and is next to the property of Mr. Philip Morton. The improvement on our property consists of an apartment building containing five apartments. All are rented. The property complies with the building ordinances and the statutes of the city and state. I make no objection to the condemnation of the front 25 feet for the widening of Fifth Street; my objection relates only to the excess appropriation. All of the property on both sides of Fifth Street is level and the buildings on each side of the street are about the same with one or two exceptions where improvements have been made.

Cross-examination:

Q. What is the rental that you receive for your apartments?

The above question was objected to and the court overruled the objection.

A. One hundred and seventy six dollars ($176.00) a month.

I do not know how old that building is. I have had possession of it for almost five years under a lease, with privilege of purchase. I bought the leasehold interest paying about Three thousand dollars ($3000.00) for the leasehold and then improved the property afterwards. The balance of the purchase price is Fifteen thousand dollars ($15,000.00).

LLEWELLYN B. REAKIRT: I live at 2020 Auburn Avenue, Mt. Auburn, Cincinnati and am the owner of the several tracts of land which lie at the south-west corner of Fifth & Sycamore Streets, being composed of five different lots which in their aggregate are 149.67 feet on the west side of Sycamore street and 138.81 feet on the south side of Fifth street. I have owned this property for probably twenty-five years or more. I make no objection to the condemnation of the north 25 feet for the purpose of widening Fifth street. There is no building on the property; part of it is occupied by a filling station and the rest of it is a parking place for automobiles —in the main it is a vacant lot. At the northeast corner of the lot there is a filling station building that is fifteen feet square that has a little porch in front of it under which automobiles drive to get their gasoline. The corner post of this porch sticks out into the twenty five feet to be appropriated. At the south end of the lot there is a little shed where the caretaker of the parking lot stays. This is unimproved property and is perfectly level. I think there is about a foot difference in the elevation from the corner of Fifth and Sycamore to the southeast corner of the lot. The property is under a perpetual lease subject to certain privileges and with certain rentals to Mr. Walter J. Friedlander dated the 25th of May, 1925.

Counsel for the plaintiff offered this lease in evidence marked "Plaintiff's Exhibit No. 2."

WALTER J. FRIEDLANDER: I live at 688 North Crescent Avenue, Cincinnati. I am the owner of the lease marked "Plaintiff's Exhibit No. 2". The action of the city in not allowing us a permit to put up a building and these condemnation proceedings have interfered with the erection of a building on that lot.

Q. If you shall be at liberty to improve your property, what is the general nature or character of the improvement that would be built upon it?

The above question was objected to by counsel for the defendant; the court sustained the objection whereupon counsel for the plaintiff reserved an exception and proffered in evidence that the lessor and lessee have contemplated the erection of splendid improvements there and it would be splendidly improved by this time but for the action of the city in insisting upon this excess condemnation.

Q. Mr. Friedlander, heretofore and during your ownership of this lease had you planned, or have plans been made for the erection of buildings upon this land which have been interfered with by these condemnation proceedings?

A. Yes, we have such plans.

Mr. Alexander: I object.

The Court: The answer may remain in.

Mr. Alexander: Note an exception.

Q. Have you requested the city to release this property from excess condemnation for the purpose of putting up such building?

Mr. Alexander: I object.

The Court: He may answer.

Answer: Yes, we have had a good many conferences with the city.

Q. And what was the nature of the building that you had the plans for and actually proposed the erection of there?

Mr. Alexander: I object.

The Court: I will sustain the objection—the same question as heretofore offered.

Judge Peck: May I let him answer just for the purpose of the proffer of the proof?

The Court: Yes.

Whereupon counsel for the plaintiff proffered the following evidence. "It was proposed to erect an athletic club on this property—it was to be a fifteen story building, costing about One million three hundred thousand dollars ($1,300,000.00)".

Q. Assuming this street is widened by twenty-five feet and this property left in the possession of the lessees, state whether or not in your judgment it will be available for a building of the best type.

Mr. Alexander: I object.

Q. In a city such as this?

A. It would.

Mr. Alexander: I think the property will speak for itself, if your honor please, size and location of the property.

The Court: The answer may remain in.

Q. And even assuming that Fifth Street is not widened, state whether or not in your judgment this tract of property would be available for such a building?

Mr. Alexander: Same objection.

The Court: He may answer.

A. It would.

No cross-examination.

WILLIAM O. MASHBURN: I live at 2146 Cameron Avenue, and am jointly interested with Mr. Friedlander in the ownership of this lease. This lease has a substantial market value. I am familiar with the plans for the erection of a big athletic club on this corner.

Q. State why, if at all, if there is any reason, why the building was not erected?

Mr. Alexander: I object.

The Court: Mr. Friedlander has testified to that has he not?

Judge Peck: Yes, your Honor, I just wanted to supplement it by the testimony of Mr. Mashburn.

The Court: He way answer.

Mr. Alexander: Note my exception.

A. On account of the interference of the city, and this suit.

No cross-examination:

Whereupon counsel for the plaintiff offered in evidence and read to the court a stipulation between counsel as to evidence, the same being offered as evidence in each of the three cases herein and marked "Plaintiff's Exhibits Nos. 3, 4 and 5."

Counsel for the defendant reserved an exception to item No. 7 of said stipulation on the ground that the character of the buildings on the north side of Fifth street is not competent in this case; said exception being noted by the court. It was thereupon agreed between counsel for the plaintiff and counsel for the defendant that the city is not condemning any property on the north side of Fifth street.

Whereupon the plaintiff rested its case.

Thereupon the defendant offered the following testimony.

HIRMAN S. MATHERS: I live at 426 East McMillan Street, Cincinnati and have been a real estate broker for over thirty-nine years. I have been employed on various occasions as appraiser in the appraisal of real estate taken for public purposes and other purposes. I was employed by the city of Cincinnati to appraise the parcels of real estate which the city proposes to take in connection with the improvement of Fifth Street from Main Street to Pike Street. I have appraised the property of Margaret W. Vester, 428 Broadway, the third piece south of Fifth Street on the east side.

Q. What was the value of that property as it at present stands according to your investigation?

Counsel for the plaintiff objected to the above question; the court sustained the objection, whereupon counsel for the defendant proffer the following testimony.

(The present value of the Vester property at 428 Broadway is in the opinion of this witness the sum of forty six thousand six hundred dollars ($46,600.00) and this witness would testify that after the improvement of Fifth street, the value of the property would be in excess of that amount.)

I would not be able to state the character of the Vester property but it is a building apparently fifty or sixty years old and probably older. I have not been through the building. It is a three story building.

I have investigated the Richards property on Fifth Street near Pike. The dimensions of that property are twenty-three by one hundred (23 x 100). The property runs through from Fifth Street to a twenty (20) foot alley, called Buchanan Street.

Q. What in your opinion is the value of that property as it stands today?

The above question was objected to by counsel for the plaintiff. The court overruled the objection and an exception was noted.

A. Twenty eight thousand eight hundred dollars ($28,800.00).

Q. What in your opinion would be the amount payable to the owners of that property if only the twenty-five foot strip were taken; that is including the damages that would be suffered.

A. Fifteen thousand dollars ($15,000.00).

Judge Peck: We object to that your Honor.

The Court: He may answer.

Judge Peck: Exception.

After the improvement on east Fifth street is made the value of the seventy-five feet left would be in excess of its present value.

I have investigated the property at the southwest corner of Fifth and Sycamore, known as the Reakirt property, having a frontage of 138 feet and a fraction, and a depth of 150 feet along Sycamore street.

Q. What in your opinion is the value of the property at the present time as it stands?

Judge Peck: We object to that your Honor.

The Court: I can't see the relevancy of it. The witness may answer subject to the objection.

Judge Peck: Exception.

A. Five hundred and fifty five thousand three hundred and twenty dollars ($55,320.00).

Q. What in your opinion is the value of the twenty five foot strip taken off the north side of this property?

Judge Peck: May I also have an objection to that question?

The Court: Same ruling.

Judge Peck: Exception.

A. Ninety two thousand five hundred and fifty dollars ($92,550.00).

I have read the lease from Mr. Reakirt to Mr. Friedlander and know its terms. In my opinion that leasehold has a value over and above the interest of Mr. Reakirt. Practically all of the buildings along the south side of Fifth street between Main and Pike streets, are old buildings, except the Government Square Garage which is next west of the Reakirt property and about thirty feet east of the alley east of Main street; the Masonic Temple and the Fontbonne building. You would hardly term the John Van Range Company building an old building but it is probably twenty-five years old. I could never find out the exact date when that was built. It is a very good substantial building and could be used for offices or merchandising or factory. The other substantial buildings on the south side of Fifth Street are the Tietig building at the southwest corner of Fifth and McAllister and the new building at the southwest corner of Fifth and Pike. Aside from these buildings that I have specified the buildings are all old. The only exception is one at the corner of the alley east of Main street. There has been a new front put in that and some alterations made, but the side walls are still there. The others are all residence property now except Mr. Vester's corner at Fifth and Broadway; that has a store on the corner. What I have said as to the character of these buildings applies also to the three buildings on the east side of Broadway which are included and the two or three buildings on the west side of Pike street which are included.

Cross-examination:

I have never been inside of Mr. Richards's house. He was away at the time and we did not go through. I had been through the house about two years previous to that. I do not know the extent of the improvements Mr. Richards has made in converting the building into flats. We made the estimate on what we thought possibly it was.

After Fifth Street has been widened twenty-five feet, the residue of the property will be more valuable than the residue would be at the present time. In other words it is my view and judgment that the widening of Fifth Street will benefit all the property on the south side from Main Street to Pike Street. The property on the north side should also receive a similar benefit. It is of the same character as the south side except certain buildings. On the north side there has only been two buildings I believe built in recent years; the Fenwick Chapel and the Fleisher Building between Broadway and Sycamore. The rest of the property on the north side of Fifth Street is of the same character as that on the south side, except that between Sycamore and Main they are store buildings principally. The other part is more or less residence property.

Redirect Examination:

I have never given the subject any particular study but the main feature in producing an increase in value in this property would be the widening of Fifth street.

Recross-examination:

Q. That aggregating of parcels would in and of self.

A. That would probably come about.

Q. I say, that aggregating of parcels would in and of itself increase values, would it not?

A. Yes, but that would follow the widening of Fifth street.

Q. Whether the city condemned the excess or not?

A. Not necessarily, but a natural consequence.

Thereupon counsel for the defendant offered in evidence a certified copy of a resolution by the Council of the city of Cincinnati, Ohio, dated July 6, 1927, marked Defendant's Exhibit A.

Counsel for defendant also offered in evidence a certified copy of Ordinance No. 155-1928 of the city of Cincinnati, Ohio marked Defendant's Exhibit B.

Counsel for the defendant also offered in evidence photographs showing the south side of Fifth street marked Defendant's Exhibit C to O inclusive. At this point counsel for the plaintiff offered in evidence photographs of the north side of Fifth street marked Plaintiff's Exhibits Nos. 6 to 14 inclusive.

Counsel for the defendant objected to the introduction of the Plaintiff's Exhibits 6 to 14 inclusive. The court overruled the objection and counsel for the defendant reserved an exception.

JOSEPH W. FRIETSCH: My office address is 708 Mercantile Library Building, Cincinnati, Ohio, I have been engaged in the business of a real estate broker for over forty years and in that time, have done a great deal of work in appraising real estate. Mr. Mathers and I worked together in the appraisal of these properties in connection with the east Fifth street condemnation. I have heard his testimony and would testify the same way Mr. Mathers did. We have agreed upon the joint valuations.

ERWIN KRAEMER: I live at 311 Oregon Street, Cincinnati and am Assistant Civil Engineer of the City Planning Commission. I have occupied that position since June 1926. Prior to that time, I spent two years with Technical Advisory Corporation who were the Consulting Engineers for the city plan.

Thereupon counsel for the defendant offered in evidence a plat marked Defendant's Exhibit P.

Defendant's Exhibit P, being adopted by the Planning Commissioner sets forth thoroughfares either as existing streets or planned as thoroughfares, and proposed extensions to already existing thoroughfares so as to link up the street system and make a co-ordinated ssytem of circulation throughout the city for main arteries. This plan was adopted by the city on March 5, 1925 as stamped on the face of the drawing. The plan indicates an extension, by means of symbols and legends which are on the plan, from Fifth and Pike streets in a general eastwardly direction to about the intersection of Third and Eggleston Avenues where it meets another intersection, then going on eastwardly with a new street and extension, so as to link up with the so-called Columbia Avenue Boulevard. According to the plan this linking is make by means of a viaduct over Eggleston Avenue—one, or maybe more than one, will be necessary. There is also another viaduct connection over Eggleston Avenue running from Third Street.

The voters in I think 1926, authorized the issue of bonds for the development and completion of a drive from Third and Pike Streets to Madison and Grandin Road. There have not as yet been any provisions for this viaduct connection from Fifth and Pike over to the Third Street viaduct. Assuming that the Third Street viaduct is built the most convenient method of approach from Government Square to the Third Street viaduct would be by means of Fifth Ftreet and Pike Street to Third.

Thereupon counsel for the defendant offered in evidence a plat marked Defendant's Exhibit Q.

The title of Defendant's Exhibit Q is "Alternate Routes from the Proposed Fifth Street Extension, prepared by the City planning Commission, 1924". This particular drawing shows the various schemes or alternatives for the extension of Fifth street to link up with the intersection of Madison Road and Grandin Road.

Thereupon counsel for defendant offered in evidence a plat marked Defendant's Exhibit R.

The title of Defendant's Exhibit R is; "The Third Street—Columbia Avenue—Torrence Road Boulevard". It is known as Accession No. 15,877 of the Department of Highways, Cincinnati, The heavy blue line on this plat shows the route that would be used should the Fifth Street viaduct not be built, so as to connect Government Square by the Third Street—Columbia Avenue—Torrence Road Boulevard to Madison and Grandin Roads.

Cross-examination:

The council of the city of Cincinnati has not to my knowledge authorized the extension of the Fifth Street viaduct. These plans are mere proposals of the planning commission. The planning commission is a body that has the power of adopting official plans but they do not have the power to put through the plan. They recommend and the city council is the one that passes on it. The city council has never adopted any Fifth Street viaduct to my knowledge. Defendant's Exhibit R is a plan for a Third Street—Columbia Avenue—Torrence Road Boulevard and contemplates that the boulevard should extend from Third Street in the city of Cincinnati across on a viaduct over Eggleston Avenue and out Columbia Avenue and Torrence Road. I do not know who penciled Fifth Street instead of Third Street as a connection on this plat. That was a part of the route —in other words the using of Pike Street. I don't know whether or not the route contemplated when the plat was drawn was Third Street; the legend says nothing about Fifth Street—someone in the highway department put this blue pencil mark on the plat—that is a part of our office record. This blue penciling was done previous to 1926. I first saw this plat somewhere in the latter part of 1926 and at that time, it had this blue pencil mark on it. There has been and there still is to a certain extent a great deal of discussion as to the best method of approach of the proposed Third Street viaduct. I would not say that the more direct line would be to approach it by Third Street from the heart of the city because if the heart of the city we consider to be Fountain Square we would have to go southwardly on some other street; Walnut, Vine or Main, to Third, but if we go out on Fifth to Pike, which is a sort of diagonal in that section, it is a somewhat shorter distance over Fifth.

There are a good many things such as the surface of the street, congestion and the opportunity for driving, that could influence an automobile driver to take either Fifth Street or Third Street, as circumstances might dictate.

Redirect Examination:

If you go to the viaduct from Fountain Square by way of Third Street, you would have first to go down a considerable grade to get to Third Street—the best and most level grade is by way of Fifth and Pike Streets.

Recross-examination:

If you go by way of Fifth Street after you get to Pike Street there is some grade, but it is a very low grade compared to the hillside street from Fourth to Third.

Whereupon counsel for the defendant offered in evidence a certified copy of Ordinance No. 318-1927 of the city of Cincinnati, marked Defendant's Exhibit S also a certified copy of a Resolution of the Council of the city of Cincinnati passed September 1, 1926 marked Defendant's Exhibit T also a certified copy of the abstract of the votes passed at the referendum referred to in Defendant's Exhibit T, marked Defendant's Exhibit T-1.

Whereupon defendant rested the case.

Thereupon the plaintiff offered the following evidence in rebuttal.

WILLIAM O. MASHBURN: I am familiar with the value of my property at the corner of Fifth and Sycamore Streets and have had negotiations concerning it. I have studied it in the view of market values. I do not agree with the value placed thereon by Mr. Mathers and in my judgment the property is worth greatly in excess of five hundred and fifty thousand dollars ($550,000.00). Dealings have been had or offers made upon basis greatly in excess of that sum.

No cross-examination.

JAMES S. RICHARDS: I am familiar with the value of the property I own on the south side of Fifth Street and with values in that neighborhood. I am the owner of other properties in the neighborhood. In my judgment the value stated by Mr. Mathers, Twenty eight thousand eight hundred dollars ($28,00.00), does not reflect the true value of my property. In my view the property is worth greatly in excess of that sum.

Cross-examination:

I own the property on the north side of Fifth Street between Main & Pike, almost opposite from the property I own on the south side. I bought this piece in question almost five years ago upon the basis of $18,000.00, but I put much money in improvements since. I have spent approximately $6,000.00 on the property so that it now stands me at this time about $24,000.00. Whatever value there is has come to it in my opinion, since I bought it. This street has changed very much during the period since I bought the property. There have been two wonderful improvements there the Masonic Temple and the Fontbonne. These improvements certainly brought additional value. I think the Masonic Temple does considerable business in its Auditorium. The theatre there brings big crowds there that weren't there before. Since I bought my property the John Van Range

Company has moved out and abandoned its business at the southwest corner of Broadway & Fifth. The Masonic Temple has acquired that property as I understand it. That is the general understanding that the Masonic Temple has bought it. I don't know anything about the deeds.

Thereupon plaintiffs rested the counsel proceeded with oral argument.

The foregoing, including the exhibits introduced as aforesaid, to-wit: plaintiffs' exhibits Nos. 1 to 14 inclusive and defendant's exhibits Nos. A to T inclusive and No. T-1 is all the evidence that was before the court and is all the evidence in these causes upon the issue joined in each cause between the respective plaintiffs and defendant the City of Cincinnati by the amended bills filed by the respective plaintiffs and the answers to said amended bills filed by the City of Cincinnati; and is all the evidence upon which the respective decrees and orders of November 26, 1928, in said causes were made and entered.

And the court hereby certifies that those parts of the evidence herein reproduced in the exact words of the witness were directed to be so reproduced by the judge at the request of the parties hereto.

Approved: January 7, 1929.

Peck, Shaffer & Williams,
Attorneys for Plaintiffs.
John D. Ellis,
City Solicitor,
Ed F. Alexander,
Assistant Solicitor,
Attorneys for Defendant.

Approved as a statement of the evidence, January 7th, 1929.

Smith Hickenlooper,
Judge.

OPINION UPON FINAL SUBMISSION IN NOS. 555, 556 AND 557—Filed Nov. 28, 1928.

Hickenlooper, District Judge (Orally, November 24, 1928):

As I stated yesterday, I realize that in the several cases of Vester, Reakirt and Richards against the City of Cincinnati time is distinctly of the essence as far as the interests of the litigants are concerned. Counsel do not so much care for the decision of the nisi prius court as for an early appeal and determination by the Court of Appeals. For this reason I am disposed to render an oral opinion from the bench rather than to attempt a more detailed study of the questions involved or perhaps a more scientific and carefully prepared opinion.

I think that it may be conceded as an elementary principle of our law, that property may be taken by and through condemnation proceedings only for a public use. Perhaps one of the fundamental and deeply rooted principles of our law is that personal ownership of property shall be held inviolate. This personal ownership must of course be subservient to and yield to the public need, but insofar as that need is not for public use the inviolability of private ownership must be preserved.

I think it is also evident that whether by State Constitution or enactment of the Legislature, any law which authorizes condemnation for other than a public purpose must fall as contrary to the Fourteenth Amendment of the Federal Constitution, which provides that one shall not be deprived of his property without due process of law. Due process of law contemplates and requires the public use in condemnation proceedings before such a taking would be upheld. In these cases it is not necessary that the court assume to declare a provision of the State Constitution null and void as in conflict with the Federal Constitution. If the action of the municipality deprives the plaintiffs of rights guaranteed them by the Constitution of the United States then such action of the municipality may be enjoined, leaving the constitutional provision to be operative in cases in which they may lawfully be applied. It is of course not necessary to here define the scope of those cases in which this constitutional provision may be held operative. Doubtless a number would suggest themselves to the minds of counsel and perhaps are rather vividly suggested by the twelfth power of appropriation granted to municipalities in section 3677 of the General Code. This section provides that municipalities shall have power to appropriate property for public purposes—

> "12. For establishing esplanades, boulevards, parkways, park grounds, and public reservations in, around and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds of such resale as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air and usefullness of public grounds occupied by public buildings and esplanades and park ways leading thereto."

This is the only section of the General Code of which the court has knowledge which appears to have been passed with direct reference to Article 18, Section 10, of the State Constitution. It suggests to the mind of the court that perhaps this section of the constitution was intended—certainly it has been applied—to supplement or provide a power of zoning the environs of some public improvement.

Counsel for the plaintiffs have also suggested that it might include the condemnation of property adjacent to a public improvement necessary for the maintenance of that improvement, such as an easement of lateral support. This power the municipality always had and it is doubtful whether any additional constitutional provision was necessary to give that power to the municipality. But whatever the proper and appropriate scope of this provision of the constitution may be, it is necessary here only to determine whether or not the rights guaranteed by the Federal Constitution to the several plaintiffs have been invaded by the action of the municipality with regard to whether there are other cases in which the constitutional provision might be applied or other instances for its appropriate application. The cases cited on the part of the plaintiffs likewise establish, and are not disputed by the city, that injunction will lie in the event the use be not a public one and, in fact, that this is practically the only appropriate remedy in the State of Ohio.

The question thus resolved itself into whether the purpose or use here disclosed is a public one. Ordinarily the purpose of the condemnation is declared by the legislation, by the declaration of intention to condemn. An examination of this legislation in the present cases discloses that 25 feet are taken for street purposes. The so-called excess is not taken, so far as appears from the legislation, for any generally recognized public use but, in the language of council, and in the language also of the State Constitution, has been appropriated simply in furtherance of the use for which the 25 feet has been taken. Just how it is in furtherance of the use is left to conjecture or at least to determination from the evidence introduced in these cases.

Argument of counsel for the City suggested whether this was then a justiciable question, whether it was a subject open to inquiry. Having been declared as taken in furtherance of the public use, can the court inquire whether it is in fact thus in furtherance of such public use? Were the resolutions of council to the effect only that it was necessary to appropriate the entire depth of the property sought to be condemned for the purpose of widening Fifth Street and providing public squares or thoroughfare improvement, the court would be clearly of the opinion that we could not pass beyond that declaration of intention or inquire as to the good faith of the city in making the appropriation; we would have to accept that declaration of intention as final and conclusive and the use would thus be a public use—so declared and so in fact. This situation, however, would present multiple difficulties if, having so appropriated the property for street purposes the city council and those in control decided subsequently to change the improvement and to sell off a portion of the property thus appropriated. Questions of the right of reverter in cases of abandonment of street uses might arise and, clearly, difficulties would be presented which could not be anticipated with safety by the city. But however that may be, there has been no attempt upon the part of the city to make an appropriation of the entire depth of the properties involved for street purposes. Nor is there apparent from the evidence or from the legislation itself any way in which the appropriation of the excess depth can serve to benefit, advance, or in any way preserve the public improvement which is the "piece de resistance" of the entire proceeding.

It is frankly conceded, I think, in argument if not in the evidence, that the purpose of this excess condemnation was the recoupment, by dealing in real estate, of a large portion of the heavy expense necessary for this project. So far as we have been able to analyze the evidence, this is the only motive or purpose of the excess condemnation, the only method in which such excess condemnation can, in the language of the constitution, be in furtherance of the public use. Not even slight suggestions are given to the court as to the restrictions which shall be imposed in case of resale to preserve the improvement made, except and unless such restrictions may be considered as founded upon the intent to aggregate the numerous parcels so appropriated, or to consolidate into one ownership a multiplicity of individual ownerships.

Counsel for the defendant has urged upon the court that one of the chief justifications for excess condemnation may be found in the theory of remnants, that is, that legitimate condemnation may produce small remnants of real estate left in the hands of the original owners or such parcels as are irregularly shaped and of little or no practical value, that in the case of these the city will eventually pay the total value of the entire parcel and should be entitled to take such entire parcel and to dispose of the remnant to adjoining property-owners, so that such property-owners might procure a frontage upon the improvement and possibly bear their share of the expense. Upon this contention it is only necessary to say that in none of the cases of these plaintiffs, with the possible exception of the Richards case, is the doctrine of remnants even remotely applicable. Counsel has conceded in argument that that cannot be styled a remnant which in fact is not so. Certainly with reference to the Reakirt property the north one-sixth, approximately—almost exactly—only is taken; the remainder is of sufficient size to make it available for almost any use to which it could be put in its entirety, that is, before condemnation. In the case of the Vester property no parcel or part of this property is taken whatsoever, and the entire tract cannot therefore be said to be a remnant left after condemnation. It is true that there is a possible remnant just north of the Vester property; the Podesta property has, I think, eight feet taken from its northerly side. This leaves some nineteen feet in the Podesta property which is not to be classified with those cases where but a few feet or a few inches are left adjacent to the improvement. The present drugstore of the plaintiff Vester is but seventeen feet in width; the present Podesta property is susceptible certainly of the same use to which the corner property is now put. But even though this division of the Podesta property might justify the city in taking the remnant of that property and disposing of it to Vester or elsewhere, the fact of an adjacent remnant does not seem to the court to justify the taking of a wholly independent tract not adjacent the improvement, not in any way connected with it, no more nearly related to it than other property on the north side of Fifth Street or on any of the intersecting streets in the immediate neighborhood.

The court is also of the opinion that excess condemnation might be justified, and if authorized by statute or constitution might be indulged in, in cases where the appropriation of property so damages the improvements upon the real estate itself or upon the real estate so appropriated as to substantially cover the entire value of the parcel, in other words, where property has upon it very valuable improvements in the way of building structures and the condemnation proceedings cut that building in half or so reduced it in size that the value of the ground is the minor consideration in the assessment of damages while the damages to the improvement is the major consideration. In such cases the improvement upon the property appropriated being practically destroyed it would seem that the city should be given the privilege of taking such property in its entirety and of availing itself of any value in the real estate that might remain by way of recouping some of the damage sustained or some of the compensation required through the destruction of such improvement. In this manner the property-holder would receive the full value. The land value remaining might then be considered by the remnant of the original value of the improved real estate. The city might to a certain extent receive the benefit of the increment in value due solely to the street improvement, which of course may not be taken into consideration in assessing damages at the time of condemnation. Considerations of fairness and justice toward the city might authorize the excess condemnation proceedings in cases of this sort also but here again we are not concerned with this, for neither the Constitution nor the General Code nor the legislation in this particular case have taken this ground as the basis for the excess condemnation. This doctrine would further apply only to the Richards case, for, as I have said, the Vester property is not cut in two, the Reakirt property is unimproved, and no such improvements are therefore destroyed.

With reference to the Richards parcel, and unquestionably to other parcels in that neighborhood, the building will be seriously damaged. Constructed to the north property line, 25 feet will be taken from that building, leaving a portion of the structure remaining which, at least in the mind of the court, it is doubtful will be susceptible to reconstruction or repair. But, as I have said, logical as such excess condemnation might appear upon the theory that the land value remaining constitutes but a remnant of the full value, we are inclined to believe that the matter cannot be considered at this time as founded upon any such doctrine.

We have thus seen that the remnant theory and the substantial damage to improvements upon real estate are both inapplicable to the present cases, and the only remaining question is whether or not financing the main improvement or the theory of replatting or aggregating small parcels may be considered as a public use. There has been some discussion in argument as to the precise definition of a public use. The court feels that, at least, a public use must be a use of the property for the benefit of the public, a use of the property for some period, short or long, a use of the property as property for the benefit of the public. This is recognized by Section 10 of Article 18 of the Ohio Constitution, which specifically provides that the excess appropriation shall be "in furtherance of" the public use and that the restrictions imposed upon resale shall be appropriated "to preserving the improvement made". This requires we think direct and substantial relationship in the furtherance and protection of the improvement between the property itself and the improvement. Certainly, the mere appropriation of excess for the purposes of resale at a profit is not in furtherance of the purpose of the municipal improvement here, which is the construction of a street or highway. Nor would any restrictions that might be imposed upon the resale of this property in any way affect or preserve the improvement of the street. In fact, the only suggested restrictions have been that the city might aggregate the separate parcels and thus restrict building in this vicinity to that of such size and nature as would improve the entire locality and benefit the community as a whole. This is not a restriction in support of or connected with or in any way preserving the improvement of Fifth Street. It is a general community benefit, wholly disassociated from the precise public improvement undertaken by the city. Certainly, the city has no power to enter into the realm of a dealer in real estate for financial gain only; and when there is a marked line of seperation between the improvement and the dealing in real estate, and the only possible connection between the two is the entering upon a business for profit in order to make possible the improvement, then it would seem clear to the court not only that the city is not acting under the constitution, but further that the attempted exercise of power is beyond authority of law.

The court is very strongly impressed with the fact that the decisions upon the subject of excess condemnation are practically uniform and one way. Courts of last resort in Massachusetts, Virginia and Pennsylvania —I have not examined the New York case cited—but at least in these three the courts have held that excess condemnation, at least for the purposes here involved, was in contravention of the Federal Constitution and could not be supported. There are no decisions cited to the court precisely to the contrary, all authorities cited by the defendant being in the nature of persuasive authority or argumentative development of the contentions of the defendant. In the case of **Clark v. Nash,** 198 U. S. 361, which was strongly relied upon by the defendant, there was a public purpose in the development of the entire surrounding community. In the West irrigation is as vitally a public purpose as the maintenance of a system of electric light, water supply, or gas distribution in the East. To provide for irrigation or the right to irrigation is to subserve a public purpose; to require the individual right in property to be subservient to the right of the public to obtain irrigation is to further a public use. The same distinction may be made as to **Strickley v. Highland Boy Gold Mining Co.,** 200 U. S. 527, which was also strongly relied upon. The development of the mineral resources of a State redound to the benefit of the entire State and constitute in a way a public service, at least to the extent that rights of condemnation of means of transporting the ore or removing it from the mine to a railroad may be, as they were there, upheld. The case of **Old Dominion Land Co. v. United States,** 269 U. S. 55, presents to our way of thinking no support for the doctrine of excess condemnation, for having entered upon the property in time of war—I think this was that case—and constructed the warehouses upon it; the war having ended the Government was given the right to perfect its condemnation proceedings in order to preserve its interest in the property. This was much in the nature of a **nunc pro tunc** condemnation proceeding.

Some argument has been presented on behalf of the plaintiffs that the fact that certain buildings on the south side of Fifth Street were not taken demonstrated that the plaintiffs were being deprived of equal protection of the laws. We were at the time and are now unable to see the application of that argument, for there is no right, as a right, in the individual to be free from condemnation. If the city be justified in condemning property it may make selection of that property which it will condemn and the fact that certain property is not condemned, as on the north side of the street, will not affect the validity of the condemnation of other property, as upon the south side of the street, for the very reason that there is no obligation not to condemn. That resting in the discretion of the city, these particular plaintiffs are deprived of no right which they hold as of right, assuming the condemnation to be valid. The condemnation may be invalid under the Fourteenth Amendment but not because, in the attempted exercise of the right to appropriate the city has considered it necessary to take the property of one but not of another.

On the whole, we are unable to believe that the only possible ground for this excess condemnation which is disclosed or even suggested in the present cases, that is, the dealing in real estate for profit, bears any such close connection with the improvement or constitutes such a public use as would justify this excess condemnation. We therefore feel constrained to grant the prayers of the several petitions, nothwithstanding the fact that the plaintiffs have entered this case with a strong presumption of the constitutionality of municipal acts against them. The court will not lightly declare any action unconstitutional; in fact it will not do so except a violation of the Constitution appears clear and manifest. In the present case it is believed by the court to have that aspect, to carry with it the necessary conviction of unconstitutionality.

So far as the petitioning property-holders are concerned, therefore, and only so far as their interests have been presented to the court, the action of the city will be enjoined for, as I have said, in the opinion of the court it is the unconstitutionality of result which is here sought to be enjoined. The court passes only upon the question whether as to these particular plaintiffs their constitutional guaranties have been violated by the municipality and finds that as to these particular plaintiffs their constitutional rights have been impinged upon.

Decree may be taken accordingly.

Smith Hickenlooper,
District Judge.

Opinion upon Final Submission, Etc.

For Plaintiffs: Hon. John Weld Peck,
Milton Sayler.
For Defendant: John D. Ellis,
Solicitor, City of Cincinnati, Ohio;
Edward F. Alexander,
Ass't Solicitor, City of Cincinnati, Ohio.

FINAL DECREE—Filed Nov. 26, 1928.

This cause came on to be heard upon the amended bill and answer thereto and upon the evidence and argument of counsel, and upon consideration thereof the Court do find for the plaintiff.

Wherefore, it is ordered, adjudged and decreed that the defendant, The City of Cincinnati, be and hereby is perpetually enjoined from appropriating under its Resolution of July 6, 1927, and its Ordinance of March 21, 1928, the plaintiff's tract of land in the City of Cincinnati, Hamilton County, Ohio, twenty seven (27) feet front on the east side of Broadway lying forty four (44) feet south of Fifth Street and extending eastwardly parallel with Fifth Street between parallel lines ninety (90) feet, or any part thereof, and that the title of the plaintiff to said property be and hereby is quieted as against the appropriation attempted to be made by defendant by the Resolution and Ordinance aforesaid, and it is further ordered that the plaintiff recover from the defendant her costs herein, to all of which the defendant excepts.

Enter:

Smith Hickenlooper,
District Judge.

PETITION FOR APPEAL—Filed Jan. 7, 1929. Harry F. Rabe, Clerk.

To the Honorable Smith Hickenlooper, District Judge:

The above named, the city of Cincinnati feeling aggrieved by the decree rendered and entered in the above entitled cause on the....day of November, A. D. 1928 does hereby appeal from said decree to the Circuit Court of Appeals for the sixth circuit for the reason set forth in the assignment of error filed herewith, and petitioner prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the sixth circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

The City of Cincinnati,
John D. Ellis,
City Solicitor.

Appeal allowed upon giving bond as required by law for the sum of $250.00.

Smith Hickenlooper,
Judge.

ASSIGNMENT OF ERRORS—Filed Jan. 7, 1929.

Now comes the defendant in the above entitled cause and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 26th day of November, 1928.

Assignment of Errors

I.

That the United States District Court for the Southern District of Ohio, Western Division, erred in its decision and judgment as follows:

The city of Cincinnati having filed an application in the Court of Common Pleas, Hamilton County, Ohio, to assess compensation for the appropriation of certain parcels of real estate abutting on or near to the south side of Fifth Street in said city, partly for street widening purposes and partly by way of excess condemnation, including the lot of plaintiff appellee, fronting twenty-seven (27) feet on the east side of Broadway, forty-four feet south of Fifth Street, extending east, parallel with Fifth Street, between parallel lines ninety (90) feet, all of said lot to be taken by way of excess condemnation in pursuance of Section 10, Article XVIII of the Constitution of Ohio, the said District Court enjoined such appropriation on the grounds as by reason of such excess condemnation, defendant appellant would be depriving plaintiff of his property without due process of law, contrary to the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

Wherefore appellant prays that said decree be reversed and that the said District Court of the Southern District of Ohio, Western Division, be ordered to enter a decree reversing the said decision in said cause.

John D. Ellis,
City Solicitor,
Ed. F. Alexander,
Assistant City Solicitor,
Attorneys for Appellant.

CITATION—Filed Jan. 7, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Sixth Circuit

To Margaret W. Vester—Greeting:

You Are Hereby Cited and Admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein the city of Cincinnati, a municipal corporation is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 7th day of January in the year of our Lord one thousand nine hundred and twenty-nine and of the Independence of the United States of America the one hundred and fifty-third.

Smith Hickenlooper,
Judge, United States District
Court of Ohio.

State of............ }
County of .... } ss.

On this........day of.........., A. D. 192 , personally appeared before me, a Notary Public in and for said County, ... and made oath that he delivered a copy of within citation to......
....
....
....

Sworn to and subscribed before me this .... day of ...., 192

....
....
....

Service of the foregoing citation waived and appearance entered.

Peck, Shaffer & Williams,
Attorneys for Margaret W. Vester.

BOND ON WRIT OF ERROR OR APPEAL—Filed Jan. 7, 1929.

Know All Men By These Presents

That we, the city of Cincinnati, a municipal corporation, organized and existing under the laws of Ohio, as principal and The Aetna Casualty and Surety Company, as sureties, are held and firmly bound unto Margaret W. Vester in the full and just sum of Two Hundred and 00/100 ($200.00) Dollars, to be paid to the said Margaret W. Vester her certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of January, in the year of our Lord one thousand nine hundred and twenty-nine.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division in a suit depending in said Court between The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio a decree was rendered against the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio and the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Margaret W. Vester citing and admonishing her to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the Sixth day of February next.

Now, The Condition of The Above Obligation is Such that, if the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio shall prosecute said appeal to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

....

....

The City of Cincinnati [Seal]
by Ed F. Alexander [Seal]
Asst. Solicitor [Seal]

The Aetna Casualty and Surety
Company,
By John B. Sauten
Attorney in Fact. [Seal]

Approved by—
Smith Hickenlooper,
United States District Judge,
Southern District of Ohio.

UNITED STATES DISTRICT COURT

Southern District of Ohio
Western Division

James S. Richards and
Paschal S. Richards,
Plaintiffs,
vs.
The City of Cincinnati, a
municipal Corpration,
under the laws of Ohio,
Defendants.

No. 556

AMENDED BILL—Filed Nov. 9, 1928. Harry F. Rabe, Clerk.

Now come the plaintiffs and say that the defendant is a municipal corporation under the laws of Ohio; that the amount of controversy herein is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that this controversy arises under and upon the Fourteenth Amendment to the Constitution of the United States of America, upon which plaintiff bases this action, and that the jurisdiction of this federal court is invoked upon that ground.

Plaintiffs say that they are the owners of a leasehold tract of land in the City of Cincinnati, Hamilton County, Ohio, on the south side of Sixth Street, sixty-one (61) feet west of Pike Street, twenty-three (23) feet front, extending south at right angles one hundred (100) feet to Buchanan Street. That the defendant, the City of Cincinnati, on July 6th, 1927, passed a certain resolution declaring its intent to appropriate for street widening purposes a strip of land twenty-five (25) feet wide adjacent to the south line of Fifth Street including the north twenty-five (25) feet of plaintiffs said property, for the purpose of widening Fifth Street twenty-five (25) feet, and at the same time declared its intent to appropriate in excess of the above described property necessary for said street widening a tract of land adjacent thereto including all of the residue of the plaintiffs' said property. Said resolution being entitled, "A Resolution declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement." By Section 3 of said resolution the Council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and preservation of said public use, but no public use of said excess is specified or stated. Thereafter, upon March 21st 1928, the defendant by its Council passed an ordinance to appropriate and did attempt to appropriate said property in accordance with said resolution, stating that said excess condemnation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use", and did order the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of these plaintiffs, as aforesaid, and thereupon the said City Solicitor did on May 4th, 1928, file an application in the Court of Common Pleas of Hamilton County, Ohio, in a case entitled The City of Cincinnati vs. Sarah Smythe, et al, being case numbered A-8538 on the docket of said court, to assess compensation, and did cause notice to be issued to the various property holders, including these plaintiffs, thereof and has caused the said case to be set down for trial on or about the 17th day of September, 1928.

The property above described sought to be appropriated from these plaintiffs by way of excess condemnation is not within the limitation of the 25 front strip aforesaid desired for the widening of Fifth Street. Plaintiffs say that the said property is not taken for any public use; that the said resolution declaring the intent of the city expressly recites that the same is not necessary for said street widening, and that the same is "in excess of that actually to be occupied by said improvement"; that no public use whatsoever to be made of said property has been stated by the defendant, and that the action of the defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made, and said property is taken for the purpose and with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated. The Charter of the City of Cincinnati is silent upon and does not purport to authorize any such excess condemnation. The proposed taking of plaintiffs' property constitutes a taking of said property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which these plaintiffs invoke.

Plaintiffs further say that the area of the property attempted to be taken by way of excess condemnation south of said twenty-five (25) foot strip is not uniform in depth and is laid out in accordance with no uniform rule, and that the lots embraced therein are of no uniform area, dimensions, or classification; that in some instances lands adjacent to the proposed improvement are omitted and in others lands are taken to unequal depths. From Main Street to Lawson Alley the property taken by way of excess condemnation is seventy-five and 40/100 (75.40) feet deep; from Lawson Alley to Sycamore Street the same is one hundred and twenty-four and 67/100 (124.67) feet in depth; from Sycamore Street to Broadway no property whatever is taken by way of excess condemnation, the property being left undisturbed in possession of present owners.

Between Broadway and McAllister Street and also between Lawrence and Pike Streets the property taken by way of excess condemnation is about seventy-five (75) feet in depth, but between McAllister Street and Lawrence Street no property whatever is so taken, the same being left in the possession of its present owners.

While said property so taken by way of excess condemnation is taken with the expectation and purpose on the part of the defendant that the increase in the value of same, including plaintiffs' property and other properties similarly situated, which may accrue to the city by reason of the widening of Fifth Street, upon a resale will repay to the city the cost of making the said widening, yet the property upon the north side of Fifth Street between Main Street and Pike Street and the property immediately north thereof which is in its general character and condition, and for the most part in its improvement similar to that upon the south side of Fifth Street and will receive whatever benefits, if any, result from said street widening equally with the property on the south is nevertheless to be permitted to remain undisturbed in private ownership.

Plaintiffs say that the classification of the lands so subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others within the area of the proposed excess condemnation in favor of lands similarly situated and equally distant from the same, and that the plaintiffs are thereby denied the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, which the plaintiffs invoke in this behalf.

Plaintiffs further say that by the laws of Ohio (General Code Section 3679) in order to warrant the appropriation of private property by municipal corporations it is necessary said corporation should by resolution define the purpose of the appropriation; that the defendant never has defined the purpose of this excess appropriation by resolution. That it is necessary under the laws of Ohio that the application for the assessment of compensation disclose the object proposed to be accomplished by such appropriation, but that the application filed by defendant in the Court of Common Pleas to appropriate said property fails to make any other disclosure of the object of said appropriation of the property in question than to say that the same is taken in furtherance of the public use of widening Fifth Street "by way of excess appropriation in accordance with the provision of Article XVIII, Section 10, of the Constitution of Ohio."

Plaintiffs say that notwithstanding the unconstitutionality, illegality, and insufficiency of the attempted appropriation the plaintiffs are, under the laws of Ohio and the decisions of its Supreme Court, without any adequate remedy at law that can be asserted either in response to said application to assess compensation or otherwise.

Plaintiffs further say that the said resolution so declaring the intent to appropriate said property was passed upon July 6th, 1927; that the property of these plaintiffs have been kept under appropriation proceedings, unconstitutional and invalid for the reasons hereinabove set forth, now for more than one year last past; that its marketability and availability for improvement and value have been thus impaired, and that the plaintiffs have suffered, are suffering and will suffer great injury, for all of which they are without adequate remedy at law, and their said injury is and will be irremediable unless the said appropriation acts herein complained of are enjoined by this honorable court.

Wherefore, these plaintiffs pray that the defendant be perpetually enjoined from proceeding with said excess condemnation or from appropriating any part of these plaintiffs' property except that actually desired for the widening of Fifth Street and within the 25 foot strip aforesaid, for a temporary injunction pending the hearing of this cause, and for all such other, further and general relief as plaintiffs are in equity entitled to receive.

Peck, Shaffer & Williams,
Attorneys for Plaintiffs.

State of Ohio, }
Hamilton County. } ss.

JAMES S. RICHARDS, being first duly sworn, deposes and says that he is one of the plaintiffs in the above entitled cause, and that the facts set forth in the foregoing petition are true.

James S. Richards.

Sworn to before me and subscribed in my presence this 6th day of November, 1928.
(Seal)

Alma Helm,
Notary Public, Hamilton County, Ohio.

40c due Notary.
File:
Hickenlooper, J.

ENTRY CORRECTING AMENDED BILL—Filed Nov. 26, 1928.

Upon application plaintiffs are granted leave to correct amended bill on page 1, second paragraph, line three by striking out "Sixth" and inserting "Fifth".

Hickenlooper, J.

Enter.

ANSWER TO AMENDED BILL—Filed Nov. 20, 1928.

Now comes defendant, the City of Cincinnati, and for answer to the amended bill of plaintiff, admits that it is a municipal corporation under the laws of Ohio; that the amount in controversy herein is in excess of three thousand dollars ($3,000.00), exclusive of interest and costs; that plaintiffs are the owners of a leasehold tract of land on the south side of Fifth Street (by error called Sixth Street in the amended bill) sixty-one (61) feet west of Pike Street, twenty-three (23) feet front extending south at right angles one hundred (100) feet to Buchanan Street, as described in the petition; that the City of Cincinnati on July 6, 1927, passed a resolution declaring its intent to appropriate for street widening purposes a strip of land twenty-five (25) feet wide adjacent to the south line of Fifth Street, from the east line of Main Street to the west line of Pike Street, including the north twenty-five (25) feet of said property of plaintiffs, and at the same time declared its intent to appropriate in excess of said twenty-five (25) foot strip a tract of land adjacent thereto, including all the residue of said property of plaintiffs, the said resolution being entitled as set forth in the petition; that in Section 3 of said resolution Council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and preservation of said public use, that there after on March 21st, 1928, Council passed an ordinance to appropriate said property among other properties, in accordance with said resolution, stating that said excess appropriation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use" and ordered the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of plaintiff, as aforesaid; that thereafter on May 4, 1928, the City Solicitor filed an application in the common pleas court of Hamilton County, to wit: City vs. Smythe, et al, No. A-8538, and caused notice to be issued to the various property holders, including plaintiffs, and that the hearing at the time of the filing of petition herein had been set for September 17, 1928.

Defendant further admits that the south seventy-five (75) feet of the property of plaintiffs as appropriated by defendant is not within the limitation of the twenty-five (25) foot strip desired for the widening of Fifth Street; that the said property is in excess of that actually to be occupied by said improvement of Fifth Street; that the charter of the City of Cincinnati makes no reference to the subject of condemnation or excess condemnation; that the excess property appropriated south of the twenty-five (25) foot strip is not uniform in depth; that the area of said excess appropriation is as stated in the amended bill; that no property on the north side of Fifth Street has been appropriated.

Defendant denies that said property is not taken for any public use; and that no public use is stated in the resolution and ordinance providing for said appropriation; that the action of defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made; that the proposed taking of this property of plaintiffs constitutes a taking of the said property without due process of law, contrary to the 14th Amendment of the Constitution of the United States; that the excess property is laid out in accordance with no uniform rule; that the classification of the lands subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others; that plaintiff is by said proceedings denied the equal protection of the laws; that said proceedings are contrary to the laws of Ohio; that plaintiffs have suffered, are suffering and will suffer great injury by reason of the proceedings of the City of Cincinnati by way of appropriation or excess appropriation.

Further answering, defendant says that the two squares of Fifth Street west of Main Street, to-wit, Government Square and Fountain Square, are in the heart of the City of Cincinnati and that a large amount of traffic comes into said squares and proceeds eastwardly over Fifth Street. The width of Fifth Street in the two squares west of Main Street is one hundred and thirty (130) feet from property line to property line; the width of Fifth Street east of Main Street is sixty-six (66) feet, from property line to property line. Defendant says that it proposed to widen Fifth Street from Main Street eastwardly to Pike Street to a total width of ninety-one (91) feet by appropriating twenty-five (25) feet on the south side of Fifth Street for street purposes.

Defendant says that after said Fifth Street from Main Street to Pike Street should have been improved to its new width, it will be the widest and most imposing of the city's streets in the present main business district, and will connect with other important existing and contemplated highways. The buildings at present existing along said south side of Fifth Street, with the exception of the Masonic Temple from Sycamore Street to Broadway, and the Font Bonne Building from McAllister Street to Lawrence Street (which said buildings are new and imposing buildings and have been set back to conform to the proposed new street with) are almost without exception of great age and not capable of being used or remodeled in a manner suited to the proposed broad highway, particularly in view of the fact that nearly all the parcels of real estate along said south side of Fifth Street from Main Street to Pike Street are of small size and frontage.

Defendant says that it has appropriated in their entirely all the parcels fronting on Fifth Street from Main Street to Pike Street with the exception of said Masonic Temple property and Font Bonne property, heretofore referred to, and in addition, three tracts fronting on the east side of Broadway lying within one hundred (100) feet of Fifth Street, and two tracts on the west side of Pike Street, lying within one hundred (100) feet of the existing south line of Fifth Street. Defendant says that in so doing, it is operating under the provisions of Section 10 of Article XVIII of the Constitution of Ohio, as follows:

> "Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

Defendant says that by applying the principle of excess condemnation as herein proposed, it will be able to further the appropriate development of Fifth Street from Main Street to Pike Street as a notable highway in the City of Cincinnati. Defendant says that by using the powers conferred by said Section 10 of Article XVIII of the Constitution of Ohio, it will be able after said widening has become effective, to dispose of lots of land of such size and subject to such restrictions as shall be best suited to the new highway.

Defendant says that plaintiffs' lot has a width of but twenty-three (23) feet with a very old two-story house thereon built to the street property line as shown by the blue print attached hereto marked "Exhibit 'A'." Defendant says that by taking only the north twenty-five (25) feet of plaintiffs' property as directly required for street purposes, defendant would be compelled to pay plaintiffs for said twenty-five (25) foot strip not only the value of said strip but a large sum by way of damage done to the residue of the property inasmuch as the entire buildings would have to be destroyed and the lot left to plaintiffs would have dimensions of only twenty-three (23) by seventy-five (75) feet.

Defendant says that said lot of twenty-three (23) feet by seventy-five (75) feet which would be left to plaintiffs, if the city took only the strip directly necessary for street purposes, will be incapable of suitable development by itself to produce reasonable income on its market value, which market value is purely speculative and founded on the hope that some corporation or individual will at some time in the future find it necessary or profitable to buy out plaintiffs and a sufficient number of their neighbors to provide an adequate building site.

Defendant further says that by means of its control of the said parcels appropriated between Lawrence Street and Pike Street, it will be able to assist in the appropriate development of said territory, whereas, if the said development of said territory, whereas, if the said development is left to the hazard of private bargaining involving a large number of private interests, the appropriate development of said tract from Lawrence Street to Pike Street is likely to be delayed for a long period of time or made impossible.

Defendant further says that the present reasonable market value of the tract described in the petition under the conditions at present existing is the sum of twenty-eight thousand eight hundred ($28,800.00) dollars; that if the city appropriated only the twenty-five (25) foot strip, the compensation payable to the owners, including damages to residue would be the sum of fifteen thousand dollars ($15,000.00). Defendants say that after the effectuation of the proposed widening of Fifth Street, the lot remaining would have a market value in excess of the difference between said total value of twenty-eight thousand eight hundred ($28,800.00) dollars and said sum of fifteen thousand ($15,000.00) dollars, representing the value of the twenty-five (25) foot strip with residue damages. The increase in said market value will be due entirely to the new conditions created by the widening of Fifth Street and the proposed appropriation.

Defendant says that by paying plaintiffs the reasonable value of their said property, as described in the petition, plaintiffs will be deprived of no constitutional rights nor of any other right except the right to delay or make imposible the appropriate development of said property between Lawrence Street and Pike Street in accordance with the needs of business, industry and the public.

In conclusion the City of Cincinnati expects two things in connection with the application of the principle of excess condemnation of plaintiffs' property and to other property along the south side of Fifth Street from Main Street to Pike Street, to-wit:

> 1st. That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage.
>
> 2nd. That the increase in value of plaintiffs' property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effecting the improvement.

Wherefore, defendant prays that the petition of plaintiffs may be dismissed at their costs and that defendant may be hence without day.

City of Cincinnati,
By John D. Ellis,
City Solicitor.
By Ed F. Alexander,
Assistant City Solicitor.

State of Ohio,
County of Hamilton. } ss.

JOHN D. ELLIS, being first duly sworn, says that he is the City Solicitor of the City of Cincinnati, and that the facts set forth in the foregoing answer are true, as he verily believes.

John D. Ellis.

Sworn to and subscribed to before me this 20th day of November, A. D. 1928.
(Seal)

Bess Argo,
Notary Public, Hamilton County,
Ohio.

STATEMENT OF EVIDENCE—Filed Jan. 7, 1929.
See page 11.

OPINION—Filed Nov. 28, 1928. See page 26.

FINAL DECREE—Filed Nov. 26, 1928.

This cause came on to be heard upon the amended bill and answer thereto and upon the evidence and argument of counsel, and was submitted to the Court and thereupon the Court do find for the plaintiff.

Wherefore, it is ordered, adjudged and decreed that the defendant, The City of Cincinnati, be and hereby is perpetually enjoined from appropriating under its Resolution of July 6, 1927, and its Ordinance of March 21, 1928, of plaintiffs' property on the south side of Fifth Street sixty one (61) feet west of Pike Street, twenty three (23) feet front and extending south at right angles one hundred (100) feet to Buchanan Street that part thereof lying south of a line drawn parallel with and twenty five (25) feet south of the present south line of Fifth Street, and that the title of the plaintiffs to so much of their said property as lies south of said line be and the same hereby is quieted as against the appropriation attempted to be made by defendant by the Resolution and Ordinance aforesaid, and it is further ordered that the plaintiffs recover from the defendant their costs herein, to all of which the defendant excepts.

Enter.

Smith Hickenlooper,
District Judge.

PETITION FOR APPEAL—Filed Jan. 7, 1929. Harry F. Rabe, Clerk.

The above named, the city of Cincinnati feeling aggrieved by the decree rendered and entered in the above entitled cause on the day of November, A. D. 1928 does hereby appeal from said decree to the Circuit Court of Appeals for the sixth circuit for the reason set forth in the assignment of error filed herewith, and petitioner prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the sixth circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

The City of Cincinnati,
John D. Ellis,
City Solicitor.

Appeal allowed upon giving bond as required by law for the sum of $250.00.

Smith Hickenlooper,
Judge.

ASSIGNMENT OF ERRORS—Filed Jan. 7, 1929.

Now comes the defendant in the above entitled cause and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 26th day of November, 1928.

Assignment of Errors

I.

That the United States District Court for the Southern District of Ohio, Western Division, erred in its decision and judgment as follows:

The city of Cincinnati having filed an application in the Court of Common Pleas, Hamilton County, Ohio, to assess compensation for the appropriation of certain parcels of real estate abutting on or near to the south side of Fifth Street in said city, partly for street widening purposes and partly by way of excess condemnation, including the lot of plaintiff, appellee, fronting twenty-three (23) feet on the south side of Fifth Street by one-hundred (100) feet in depth, of which the north twenty-five (25) feet were to be taken for street widening purposes and the remaining south seventy-five (75) feet by way of excess condemnation in pursuance of Section 10, Article XVIII of the Constitution of Ohio, the said District Court enjoined such appropriation as to said south seventy-five (75) feet of plaintiff appellee's property, on the ground that by reason of such excess condemnation, defendant appellant would be depriving plaintiff of his property without due process of law, contrary to the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

Wherefore appellant prays that said decree be reversed and that the said District Court of the Southern District of Ohio, Western Division, be ordered to enter a decree reversing the said decision in said cause.

John D. Ellis,
City Solicitor,
Ed F. Alexander,
Assistant City Solicitor,
Attorneys for Appellant.

CITATION—Filed Jan. 7, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS.
For the Sixth Circuit

To James S. Richards, and Paschal L. Richards—
Greeting:

You Are Hereby Cited And Admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein the city of Cincinnati, a municipal corporation is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 7th day of January in the year of our Lord one thousand nine hundred and twenty-nine and of the Independence of the United States of America the one hundred and fifty-third.

Smith Hickenlooper,
Judge, United States District Court,
Southern District of Ohio.

State of ....} ss.
County of ....}

On this ...... day of ...., A. D. 192—, personally appeared before me, a Notary Public in and for said County, ... and made oath that he delivered a copy of within citation to ....
....
....

Sworn to and subscribed before me this ....
day of ...., 192

....
....
....

Service of the foregoing citation waived and appearance entered.

Peck, Shaffer & Williams,
Attorneys for James S. Richards
and Paschal L. Richards.

BOND ON WRIT OF ERROR OR APPEAL
—Filed Jan. 7, 1928.

Know all Men by these Presents

That we, The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, as principal and The Aetna Casualty and Surety Company as sureties, are held and firmly bound unto James S. Richards, and Paschal L. Richards in the full and just sum of Two Hundred & 00/100 ($200.00) Dollars, to be paid to the said James S. Richards, and Paschal L. Richards, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 7th day of January in the year of our Lord one thousand nine hundred and twenty-nine.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said Court between James S. Richards and Paschal L. Richards vs. The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, a decree was rendered against the said City of Cincinnati, a municipal corporation, organized and existing under the laws of Ohio and the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said James S. Richards and Paschal L. Richards citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the Sixth day of February next.

Now, The Condition of the Above Obligation is Such that, if the said City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio shall prosecute said appeal to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

....

....

Bond on Writ of Error or Appeal

The City of Cincinnati, [Seal]
by Ed F. Alexander [Seal]
Asst. Solicitor [Seal]
The Aetna Casualty and Surety Company,
By John B. Sauten,
Attorney in Fact.

Approved by—
Smith Hickenlooper,
United States District Judge,
Southern District of Ohio.

UNITED STATES DISTRICT COURT

Southern District of Ohio
Western Division.

Llewellyn B. Reakirt,
Plaintiff,
vs.
The City of Cincinnati, a municipal corporation under the laws of Ohio,
Defendant.

No. 557.

AMENDED BILL—Filed Nov. 6, 1928, Harry F. Rabe, Clerk.

Now comes the plaintiff and says that the defendant is a municipal corporation under the laws of Ohio; that the amount in controversy herein is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that this controversy arises under and upon the Fourteenth Amendment to the Constitution of the United States of America, upon which plaintiff bases this action, and that the jurisdiction of this federal court is invoked upon that ground.

Amended Bill

Plaintiff says that he is the owner in fee simple of a tract of land in the City of Cincinnati, Hamilton County, Ohio; at the southwest corner of Fifth and Sycamore Streets, being one hundred and thirty eight feet and eight (138.8) tenths in front on Fifth Street and one hundred and fifty (150) feet on Sycamore Street and running back between parallel lines; that the same is a vacant lot except for the presence of a small building about fifteen feet square used as a gasoline filling station near the corner of Fifth and Sycamore Streets, located about thirty feet distant from each of those streets; that the defendant, the City of Cincinnati, on July 6th, 1927, passed a certain resolution declaring its intent to appropriate for street widening purposes a strip of land 25 feet wide adjacent to the south line of Fifth Street, easterly from the east line of Main Street to the west line of Pike street, a distance of about five blocks intersected (from west to east) by Lawson Alley, Sycamore Street, Broadway, McAllister Street, including the north 25 feet of plaintiff's said tract, for the purpose of widening said Fifth Street 25 feet.

At the same time defendant declared its intent to appropriate in excess of the above described property necessary for said street widening a tract of land next adjacent thereto, and which includes the residue of the aforesaid property of plaintiff, said resolution being entitled, "A resolution declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement."

By Section 3 of said resolution the Council declared that said appropriation of said excess property is in furtherance of the widening of Fifth Street and necessary for the complete enjoyment and preservation of said public use, but no public use of said excess is specified or stated.

Thereafter, upon March 21st, 1928, the defendant by its Council passed an ordinance to appropriate and did attempt to appropriate said property in accordance with said resolution, stating that said excess condemnation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use," and did order the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land effected, including the property of this plaintiff, as aforesaid, and thereupon the said City Solicitor did on May 4th, 1928, file an application in the Court of Common Pleas of Hamilton County, Ohio, in a case entitled The City of Cincinnati vs. Sarah Smythe, et al., being case numbered A. 8538 on the docket of said court, to assess compensation, and did cause notice to be issued to the various property holders, including this plaintiff, thereof and has cause the said case to be set down for trial on or about the 17th day of September, 1928.

The property above described sought to be appropriated from this paintiff by way of excess condemnation, outside of and beyond the twenty five foot strip actually to be used for said street widening, consists of several lots and parts of lots of land aggregating an area rectangular in shape fronting 124.67 feet on Sycamore and 138.81 feet on Fifth Street when widened as proposed and is level and lies within and near the center of the business district of Cincinnati, is of great value and available for the building of a buiding or buildings of the highest class and character. Plaintiff says that the said property is not taken for any public use; that the said resolution declaring the intent of the city expressly recites that the same is not necessary for said street widening, and that the same is "in excess of that actually to be occupied by said improvement;" that no public use whatsoever to be made of said property has been stated by the defendant, and that the action of the defendant in attempting the appropriation thereof is a mere specualtion upon an anticipated increase in the value of the properties adjacent to said improvement when made, and said property is taken for the purpose and with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated. The Charter of the City of Cincinnati is silent upon and does not purport to authorize any such excess condemnation.

The proposed taking of plaintiff's property constitutes a taking of said property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which this plaintiff invokes.

Plaintiff further says that the area of the property attempted to be taken by way of excess condemnation south of said twenty-five (25) foot strip is not uniform in depth and is laid out in accordance with no uniform rule, and that the lots embraces therein are of no uniform area, dimensions, or classification; that in some instances lands adjacent to the proposed improvement are omitted and in others lands are taken to unequal depths. From Main Street to Lawson Alley the property taken by way of excess condemnation is seventy-five and 40/100 (75.40) feet deep; from Lawson Alley to Sycamore Street the same is one hundred and twenty-four and 67/100 (124.67) feet in depth; from Sycamore Street to Broadway no property whatever is taken by way of excess condemnation, the property being left undisturbed in possession of present owners.

Between Broadway and McAllister Street and also between Lawrence and Pike Streets the property taken by way of excess condemnation is about seventy-five (75) fet in depth, but between McAllister Street and Lawrence Street no property whatever is so taken, the same being left in the possession of its present owners.

While said property so taken by way of excess condemnation is taken with the expectation and purpose on the part of the defendant that the increase in the value of same, including plaintiff's property and other properties similarly situated, which may accrue to the city by reason of the widening of Fifth Street, upon a resale will repay to the city the cost of making the said widening, yet the property upon the north side of Fifth Street between Main Street and Pike Street and the property immediately north thereof which is in its general character and condition, and for the most part in its improvement similar to that upon the south side of Fifth Street and will receive whatever benefits, if any, result from said street widening equally with the property on the south is nevertheless to be permitted to remain undisturbed in private ownership.

Plaintiff says that the classification of the lands so subjected to excess condemnation is arbitrary and unjustly discriminates against plaintiff and others within the area of the proposed excess condemnation in favor of lands similarly situated and equally distant from the same, and that the plaintiff is thereby denied the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States, which the plaintiff invokes in this behalf.

Plaintiff further says that by the laws of Ohio (General Code Section 3679) in order to warrant the appropriation of private property by municipal corporations it is necessary said corporation should by resolution define the purpose of the appropriation; that the defendant never has defined the purpose of this excess appropriation by resolution. That it is necessary under the laws of Ohio that the application for the assessment of compensation disclose the object proposed to be accomplished by such appropriation, but that the application filed by defendant in the Court of Common Pleas to appropriate said property fails to make any other disclosure of the object of said appropriation of the property in question than to say that the same is taken in furtherance of the public use of widening Fifth Street "by way of excess appropriation in accordance with the provision of Article XVIII, Section 10, of the Constitution of Ohio."

Plaintiff says that notwithstanding the unconstitutionality, illegality, and insufficiency of the attempted appropriation the plaintiff is, under the laws of Ohio and the decisions of its Supreme Court, without any adequate remedy at law that can be asserted either in response to said application to assess compensation or otherwise.

Plaintiff fuurther says that the said resolution so declaring the intent to appropriate said property was passed upon July 6th, 1927; that the property of this plaintiff has been kept under appropriation proceedings, unconstitutional and invalid for the reasons hereinabove set forth, now for more than one year last past; that its marketability and availability for improvement and value have been and are being thus impaired and that the plaintiff has suffered, is suffering and will suffer great injury, for all of which he is without adequate remedy at law, and his said injury is and will be irremediable unless the said appropriation acts herein complained of are enjoined by this honorable court.

Wherefore, the plaintiff prays that the defendant be perpetually enjoined from proceeding with said excess condemnation or from appropriating any part of this plaintiff's property except that actually desired for the widening of Fifth Street and within the 25 foot strip aforesaid, for a temporary injunction pending the hearing of this cause, and for all such other, further and general relief as plaintiff is in equity entitled to receive.

Peck, Schaffer & Williams, and
Milton Sagler,
Attorneys for Plaintiff.

State of Ohio,
Hamilton County. } ss.

Llewellyn B. Reakirt, being first duly sworn, deposes and says that he is plaintiff in the above entitled cause and that the facts set forth in the foregoing petition are true.

Llewellyn B. Reakirt.

Sworn to before me and subscribed in my presence this 5th day of November, 1928.

Alma Helm,
Notary Public, Hamilton County,
Ohio.

(Seal)
40c due Notary
File:
Hickenlooper, J.

STIPULATION—Filed Nov. 10, 1928.

It is stipulated that the following correction may be made on the face of the bill:

Page Four, second whole paragraph, line four, change "width" to "depth";

Fifth line from the end of paragraph, change "wide" to "depth";

Third line from the end of same paragraph change "width" to "depth";

Same page, third whole paragraph, change "width" to "depth."

Peck, Shaffer & Williams,
Attorneys for plaintiff.
John D. Ellis,
Attorneys for defendant.

Approved
Hickenlooper, J.

ANSWER TO AMENDED BILL—Filed Nov. 20, 1928.

Now comes defendant, the city of Cincinnati, and for answer to the plaintiff's amended bill, admits that it is a municipal corporation under the laws of Ohio; that the amount in controversy herein is in excess of three thousand dollars ($3,000.00), exclusive of interest and costs; that plaintiff is the owner in fee simple of a tract of land at the southwest corner of Fifth and Sycamore Streets, being one hundred and thirty-eight and 8/10 (138.8) feet in front on Fifth Street and one hundred and fifty (150) feet on Sycamore street and running back between parallel lines, as described in the amended bill; that the sole building on said lot is a gasoline filling station; that the city of Cincinnati on July 6, 1927, passed a resolution declaring its intent to appropriate for street widening purposes a strip of land 25 feet wide adjacent to the south line of Fifth Street, easterly from the east line of Main street to the west line of Pike street, including the north twenty-five (25) feet of said property of plaintiff and at the same time declared its intent to appropriate in excess of said 25 foot strip a tract of land adjacent thereto including all the residue of said property of plaintiff, the said resolution being entitled as set forth in the petition; that in Section 3 of said resolution counsel declared that said appropriation of said excess property is in furtherance of the widening of Fifth street and necessary for the complete enjoyment and preservation of said public use; that thereafter on March 21, 1928, council passed an ordinance to appropriate said property among other properties, in accordance with said resolution, stating that said excess appropriation was "for the more complete enjoyment and preservation of the benefits to accrue from said public use" and ordered the city solicitor to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of land affected, including the property of plaintiff, as aforesaid; that thereafter on May 4, 1928, the city solicitor filed an application in the common pleas court of Hamilton County, to wit: City vs. Smythe, et al., No. A-8538, and caused notice to be issued to the various property holders, including plaintiff, and that the hearing at the time of the filing of petition herein had been set for September 17, 1928.

Defendant further admits that the south one hundred and twenty four and 67/100 (124.67) feet of the property of plaintiffs as appropriated by defendant is not within the limitation of the 25 foot strip desired for the widening of Fifth Street; that the said property is level and near the center of the business district of Cincinnati; that it is of great value and available for the building of a high class office building; that the said property is in excess of that actually to be occupied by said improvement of Fifth Street; that the charter of the city of Cincinnati makes no reference to the subject of condemnation or excess condemnation; that the excess property appropriated south of the twenty five foot strip is not uniform in depth; that the area of said excess appropriation is as stated in the amended bill; that no property on the north side of Fifth Street has been appropriated.

Defendant denies that said property is not taken for any public use; and that no public use is stated in the resolution and ordinance providing for said appropriation; that the action of defendant in attempting the appropriation thereof is a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made; that the proposed taking of this property of plaintiff constitutes a taking of the said property without due process of law, contrary to the 14th Amendment of the Constitution of the United States; that the excess property is laid out in accordance with no uniform rule; that the classification of the lands subjected to excess condemnation is arbitrarily and unjustly discriminates against plaintiff and others; that plaintiff is by said proceedings denied the equal protection of the laws; that said proceedings are contrary to the laws of Ohio; that plaintiff has suffered, is suffering and will suffer great injury by reason of the proceedings of the city of Cincinnati by way of appropriation or excess appropriation.

Further answering, defendant says that the two squares of Fifth street west of Main street, to wit: Government Square and Fountain Square, are in the heart of the city of Cincinnati and that a large amount of traffic comes into said squares and proceeds eastwardly over Fifth street. The width of Fifth street in the two squares west of Main street is 130 feet from property line to property line; the width of Fifth street east of Main street is 66 feet from property line to property line. Defendant says that it proposes to widen Fifth street from Main street eastwardly to Pike street to a total width of 91 feet by appropriating 25 feet on the south side of First street for street purposes.

Defendant says that after said Fifth street from

Main street to Pike street shall have been improved to its new width, it will be the widest and most imposing of the city's streets in the present main business district, and will connect with other important existing and contemplated highways. The buildings at present existing along said south side of Fifth street, with the exception of the Masonic Temple from Sycamore street to Broadway, and the Fontbonne Building from McAllister street to Lawrence street (which said buildings are new and imposing buildings and have been set back to conform to the proposed new street width) are almost without exception of great age and not capable of being used or remodeled in a manner suited to the proposed broad highway, particularly in view of the fact that nearly all the parcels of real estate along said south side of Fifth street from Main street to Pike street are of small size and frontage.

Defendant says that it has appropriated in their entirety all the parcels fronting on Fifth street from Main street to Pike street with the exception of said Masonic Temple property and Fontbonne property, heretofore referred to, and in addition, three tracts fronting on the east side of Broadway lying within 100 feet of Fifth street, and two tracts on the west side of Pike street, lying within 100 feet of the existing south line of Fifth street. Defendant says that in so doing, it is operating under the provisions of Section 10 of Article XVIII of the Constitution of Ohio, as follows:

> "Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

Defendant says that by applying the principle of excess condemnation as herein proposed, it will be able to further the appropriate development of Fifth street from Main street to Pike street as a notable highway in the city of Cincinnati. Defendant says that by using the powers conferred by said Section 10 of Article XVIII of the Constitution of Ohio, it will be able after said widening has become effective, to dispose of lots of land of such size and subject to such restrictions as shall be best suited to the new highway.

Defendant says that the tract of which plaintiff owns the fee simple title is part of the block from Main street to Sycamore street; that after the affectuation of the proposed widening of Fifth street said block will be highly desirable as a location for large buildings for important business and other purposes, provided that sites of satisfactory dimensions can be provided; that by its control of the said entire block and by imposing suitable restrictions in case of sales of parts thereof, the defendant will be able to further the development of said Fifth street in a manner befitting the new improvement.

Defendant further says that the present reasonable value in full of the real estate described in plaintiff's petition is approximately the sum of $555,000; that the value of the 25 foot strip of said real estate is the sum of approximately $92,000. Defendant says that after the effectuation of the proposed widening of Fifth street, the residue of said real estate will have a value not less than the value of the entire tract at the present time. By reason whereof defendant will by appropriating plaintiff's property in its entirety be able to pay part, if not all, the expense of the street widening in front of plaintiff's property out of the increased value which the city will confer on the residue of plaintiff's real estate by reason of the improvement, and the proposed appropriation.

Defendant further says that plaintiff's interest in the said real estate is a mere ground rest investment; that paintiff had executed a perpetual lease of the same whereby plaintiff is to receive a rental of $18,000 per year for the first ten years, $24,000 per year for the second ten years and $30,000 per year thereafter with a privilege of purchase at $600,000 at the end of thirty years; that the present value of plaintiff's investment is much less than the total present value of the said real estate.

Defendant says that by paying plaintiff the value of his investment in the real estate described in the petition, plaintiff will be deprived of no constitutional right or any other right.

In conclusion the city of Cincinnati expects two things in connection with the application of the principle of excess condemnation to plaintiff's property and to other property along the south side of Fifth street from Main street to Pike street, to wit:

> 1st. That the city will be able to further the appropriate development of the south side of Fifth street, between Main and Pike streets by using or disposing of its excess in tracts of such size and with

such restrictions as will inure to the public advantage.

2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effectuating the improvement.

Wherefore, defendant prays that the petition of plaintiff's may be dismissed at their costs and that defendant may go hence without day.

The City of Cincinnati,
By John D. Ellis,
City Solicitor,
By Ed F. Alexander,
Assistant City Solicitor.

State of Ohio, } ss.
County of Hamilton. }

John D. Ellis, being first duly sworn, says that he is the city solicitor of the city of Cincinnati, and that the facts set forth in the foregoing answer are true, as he verily believes.

John D. Ellis.

Sworn to and subscribed to before me this 20th day of November, A. D. 1928.

Bess Argo,
Notary Public in and for Hamilton
County, Ohio.

(Seal)

STATEMENT OF EVIDENCE—Filed Jan. 7, 1929.
See page 11.

OPINION—Filed Nov. 28, 1928.
See page 26.

FINAL DECREE—Filed Nov. 26, 1928.

This cause came on to be heard upon the amended bill and answer thereto and the evidence and argument of counsel and was submitted to the Court and thereupon the Court do find for the plaintiff.

Wherefore, it is ordered, adjudged and decreed that the defendant, the City of Cincinnati, be and hereby is perpetually enjoined from appropriating under its Resolution of July 6, 1927, and its Ordinance of March 21, 1928, any part of plaintiff's property at the southwest corner of Fifth and Sycamore Streets in Cincinnati, Hamilton County, Ohio, south of a line drawn parallel with and twenty five (25) feet south of the present south line of Fifth Street, and that the title of the plaintiff to so much of its said property as lies south of said line be and hereby is quieted as against the apporpriation attempted to be made by defendant by the Resolution and Ordinance aforesaid, and it is further ordered that the plaintiff recover from the defendant his costs herein. To all of which the defendant excepts.

Enter.

Smith Hickenlooper,
District Judge.

PETITION FOR APPEAL—Filed Jan. 7, 1929. Harry F. Rabe, Clerk.

The above named, the city of Cincinnati feeling aggrieved by the decree rendered and entered in the above entitled cause on the   day of November, A. D. 1928 does hereby appeal from said decree to the Circuit Court of Appeals for the sixth circuit for the reason set forth in the assignment of error filed herewith, and petitioner prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the sixth circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays, that the proper order relating to the required security to be required of it be made.

The City of Cincinnati,
John D. Ellis,
City Solicitor.

Appeal allowed upon giving bond as required by law for the sum of $250.00.

Smith Hickenlooper,
Judge.

ASSIGNMENT OF ERRORS—Filed Jan. 7, 1929.

Now comes the defendant in the above entitled cause and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 26th day of Novmber, 1928.

Assignment of Errors

I.

That the United States District Court for the Southern District of Ohio, Western Division, erred in its decision and judgment as follows:

The city of Cincinnati having filed an application in the Court of Common Pleas, Hamilton County, Ohio, to assess compensation for the appropriation of certain parcels of real estate abutting on or near to the south side of Fifth Street in said city, partly for street widening purposes and partly by way of excess condemnation, including the lot of plaintiff appellee, fronting one hundred and thirty-eight and eight-tenths (138.8) feet on the south side of Fifth Street by one hundred and fifty (150) feet on the west side of Sycamore Street, of which the north twenty-five (25) feet were to be taken for street widening purposes and the remaining south one hundred and twenty-five (125) feet by way of excess condemnation, in pursuance of Section 10, Article XVIII of the Constitution of Ohio, the said District Court enjoined such appropriation as to the said south one hundred and twenty-five (125) feet of plaintiff appellee's property, on the ground that by reason of such excess condemnation, defendant appellant would be depriving plaintiff of his property without due process of law, contrary to the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States.

Wherefore appellant prays that said decree be reversed and that the said District Court of the Southern District of Ohio, Western Division, be ordered to enter a decree reversing the said decision in said cause.

John D. Ellis,
City Solicitor,
Ed F. Alexander,
Assistant City Solicitor,
Attorneys for Appellant.

CITATION—Filed Jan. 7, 1929.

UNITED STATES CIRCUIT COURT OF APPEALS
For the Sixth Circuit

To Llewellyn B. Reakirt—Greeting:

You Are Hereby Cited And Admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein the city of Cincinnati, a municipal corporation is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 7th day of January in the year of our Lord one thousand nine hundred and twenty-nine and of the Independence of the United States of America the one hundred and fifty-third.

Smith Hickenlooper,
Judge, United States District Court,
Southern District of Ohio.

BOND ON WRIT OF ERROR OR APPEAL—Filed Jan. 7, 1929.

Know All Men by These Presents

That we, The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, as principal and The Aetna Casualty and Surety Company, as sureties, are held and firmly bound unto Llewellyn B.

Reakirt in the full and just sum of Two Hundred & 00/100 ($200.00) Dollars, to be paid to the said Llewellyn B. Reakirt certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, or heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of January, in the year of our Lord one thousand nine hundred and twenty-nine.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said Court between Llewellyn B. Reakirt and The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, a decree was rendered against the said The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, and the said The City of Cincinnati, a municipal corporation organized and existing under the laws of Ohio, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation dircted to the said Llewellyn B. Reakirt citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the 6th day of February next.

Now, The Condition of the Above Obligation is Such that, if the said The City of Cincinnati a municipal corporation organized and existing under the laws of Ohio, shall prosecute it to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

....

....

Approved by—
Smith Hickenlooper,
United States District Judge,
Southern District of Ohio.

The City of Cincinnati [Seal]
by Ed F. Alexander [Seal]
Assistant Solicitor [Seal]
The Aetna Casualty and Surety Company,
By John B. Sauten,
Attorney in Fact.

(Seal)

STIPULATION AS TO RECORD IN NOS. 555, 556 AND 557—Filed Jan. 7, 1929.

It is agreed by and between counsel for plaintiffs and counsel for defendant that the appeals in the foregoing causes may be heard together and that one record shall be prepared for all said appeals, to consist of the following:

1. Amended Bill in Cause No. 555; 1a stipulation;
2. Answer to Amended Bill in Cause No. 555;
3. Amended Bill in Cause No. 556; 3a stipulation;
4. Answer to Amended Bill in Cause No. 556; excepting plat; but with reference;
5. Amended Bill in Cause No. 557; 5a stipulation;
6. Answer to Amended Bill in Cause No. 557; excepting plat but with reference;

6a. Entry Nov. 26 '28 correcting amended bill in No. 556;

7. Narrative Statement of Evidence with all;

Exhibits as follows:

Plaintiffs Exhibits:

No. 1, City Appropriation plat;
No. 2, Lease, Reakirt to Friedlander;
Nos. 3, 4, 5, Stipulations as to evidence;
Nos. 6 to 14 inclusive, Photographs showing North side of Fifth Street.

Defendant's Exhibits;

No. A, Council Resolution of July 6, 1927;
No. B, Council Ordinance No. 155-1928;
Nos. C to O inclusive, Photographs showing south side of Fifth Street;
No. P, Plat of Planning Commission, March 5, 1925;
No. Q, Alternate Routes for Fifth Street Extension;
No. R, Plat, Third Street-Columbia Avenue-Torrence Road Boulevard;
No. S, Council Ordinance No. 318-1927;
No. T, Council Resolution of September 1, 1926;
No. T-1, Abstract of votes on Referendum;

8. Opinion of District Court Judge;
9. Judgment Entry in Cause No. 555;
10. Judgment Entry in Cause No. 556;
11. Judgment Entry in Cause No. 557;
12. Petition for Appeal in Cause No. 555;
13. Assignment of Errors in Cause No. 555;
14. Petition for Appeal in Cause No. 556;

15. Assignment of Errors in Cause No. 556;
16. Petition for Appeal in Cause No 557;
17. Assignment of Errors in Cause No. 557;
18. This Stipulation.

Peck, Shaffer & Williams,
Attorneys for Plaintiffs,
John D. Ellis,
City Solicitor.
Ed. F. Alexander,
Assistant Solicitor,
Attorneys for Defendant.

PRAECIPE FOR RECORD IN NOS. 555, 556 AND 557 —Filed Jan. 7, 1929.

To The Clerk:

Please prepare one record for the above entitled three cases, to include the following:

1. Amended Bill in Cause No. 555; 1a stipulation;
2. Answer to Amended Bill in Cause No. 555;
3. Amended Bill in Cause No. 556;
4. Answer to Amended Bill in Cause No. 556; excepting plat but with reference;
5. Amended Bill in Cause No. 557; 5a stipulation;
6. Answer to Amended Bill in Cause No. 557; excepting plat but with reference;

6a. Entry Nov. 26 '28 correcting amended bill in each case;

7. Narrative Statement of Evidence with all Exhibits as follows:

Plaintiff's Exhibits:
No. 1, City Appropriation plat;
No. 2, Lease, Reakirt to Friedlander;
Nos. 3, 4, 5, Stipulations as to evidence;

Praecipe for Record, etc.

Nos. 6 to 14 inclusive, Photographs showing north side of Fifth street.

Defendant's Exhibits:

No. A, Council Resolution of July 6, 1927;
No. B, Council Ordinance No. 155-1928;
Nos. C to O inclusive, Photographs showing south side of Fifth Street;
No. P, Plat of Planning Commission, March 5, 1925;
No. Q, Plat, Alternate Routes for Fifth Street Extension;
No. R, Plat, Third Street-Columbia Avenue-Torrence Road Boulevard;
No. S, Council Ordinance No. 318-1927;
No. T, Council Resolution of September 1, 1926;
No. T-1, Abstract of votes on Referendum.

8. Opinion of District Court Judge;
9. Judgment Entry in Cause No. 555;
10. Judgment Entry in Cause No. 556;
11. Judgment Entry in Cause No. 557;
12. Petition for Appeal in Cause No. 555;
13. Assignment of Errors in Cause No. 555;
14. Petition for Appeal in Cause No. 556;
15. Assignment of Errors in Cause No. 556;
16. Petition for Appeal in Cause No. 557;
17. Assignment of Errors in Cause No. 557;
18. Stipulation as to Record.
19. Citation in No. 555;
20. Citation in No. 556;
21. Citation in No. 557;
22. Bond in No. 555;
23. Bond in No. 556;
24. Bond in No. 557
25. Praecipe for record.

John D. Ellis,
City Solicitor.
Ed F. Alexander,
Assistant Solicitor,
Attorneys for Defendant.

PLAINTIFFS EXHIBIT No. 2.

THIS INDENTURE OF LEASE,

Made this 25th day of May, A. D. 1925, between LLEWELLYN B. REAKIRT, Lessor, and WALTER J. FRIEDLANDER, Lessee,

Witnesseth: That,

Said Lessor, for and in consideration of the rents herein reserved, and the covenants and agreements hereinafter contained, and by the said Lessee, his heirs, executors, administrators and assigns, to be paid and performed, does hereby Grant, Lease and Demise unto said Lessee, his heirs, executors, administrators and assigns, all the following described real estate in the City of Cincinnati, County of Hamilton and State of Ohio, to-wit:

Part of In-Lot Number Sixty-six (66) and Sixty-seven (67) on the original plan of the said City of Cincinnati, and more particularly described as follows:

Beginning at the Southwesterly corner of Fifth and Sycamore Streets as now existing, thence running Southwardly along the Westerly line of Sycamore Street one hundred and fifty (150) feet, more or less, to a point distant two hundred forty-nine and 45/100 (249.45) feet Northwardly of the Northerly line of Fourth Street as measured along said Westerly line of Sycamore Street; thence North 73° 37′ West, one hundred and thirty-eight (138) feet and eight (8) inches to the South-westerly corner of the property conveyed by Lillie Leonard, et al, to Lauretta B. Gibson by deed dated April 20, 1901, and recorded in Deed Book 857, Page 542, of the Records in the Office of the Recorder of Hamilton County, Ohio; thence running Northwardly along the Westerly line of said last mentioned premises one hundred and fifty (150) feet to the Southerly line of Fifth Street as now existing; thence running Eastwardly along the Southerly line of Fifth Street one hundred thirty-eight (138) feet and eight (8) inches to the Westerly line of Sycamore Street and the place of beginning.

The property hereinbefore described and hereby demised being the same premises conveyed to Lauretta B. Gibson by three deeds, as follows: by deed of Elizabeth McNicoll, widow, dated March 28, 1901, and recorded in Deed Book 856, Page 418; by deed of Edmund W. Kittredge, widower, dated February 17, 1906, and recorded in Deed Book 942, Page 442; and by deed of Lillie Leonard, et al, dated April 20, 1901, and recorded in Deed

Plaintiff's Exhibit No. 2

Book 857, Page 542, in the Office of the Recorder of Hamilton County, Ohio; the said property hereinabove described and hereby demised having been inherited by said Llewellyn B. Reakirt, Lessor herein, from his mother, the said Lauretta B. Gibson, deceased.

The premises hereinabove described and hereby demised being so demised subject to the leases of The Standard Oil Company of Ohio and The Auto Park Company, and which leases are subject to termination upon sixty (60) days' notice in writing to the said Lessees.

TO HAVE AND TO HOLD the same together with the privileges and appurtenances thereunto appertaining and belonging, unto the said Lessee, his heirs, executors, administrators and assigns, for and during the full term of ninety-nine (99) years next ensuing from the first day of June, nineteen hundred and twenty-five (1925), fully to be completed and ended, and renewable forever.

The said Lessee, his heirs, executors, administrators and assigns, YIELDING AND PAYING therefor unto the said Lessor, his heirs and assigns Eighteen Thousand Dollars ($18,000.) for each and every year of and during the first ten (10) years of the term of this demise, and Twenty-four Thousand Dollars ($24,000.) for each and every year of and during the second ten (10) years of the term of this demise, and Thirty Thousand Dollars ($30,000.) for each and every year of and during the remainder of the term of this demise; each year's rent being payable in equal quarterly instalments on the last day of each quarter thereof, and the first such quarterly installment being payable on August 31, nineteen hundred and twenty-five (1925).

The said Lessee, for himself and for his heirs, executors administrators and assigns, does hereby Covenant and Agree to and with the said Lessor, his heirs and assigns, as follows, viz:

To pay the rent above reserved, as above specified; to pay all taxes, rates, charges and assessments of every kind that may at any time during this demise be levied, rated, charged or assessed on said premises, or any part thereof, for any purpose whatsoever, except the taxes ordinarily and usually due or payable in the month of June, nineteen hundred and twenty-five (1925), which said taxes the Lessor herein shall pay and discharge.

To keep the buildings hereafter erected on said land at all times insured against loss by fire in the sum of not less than eighty percentum (80%) of the insurable value of the said buildings above foundations, in companies satisfactory to, and by policies approved by, and payable to the Lessor, his heirs or assigns, to whom they shall be delivered; and to pay the cost of all such insurance. If said buildings shall be damaged or destroyed by fire, the recovery thereon shall be applied to resorting the same; and should the amount realized on or from such insurance or under such insurance policies not be sufficient to defray the cost of restoring the said buildings damaged or destroyed by fire, then and in that event the balance of the cost required to restore the same shall be furnished and paid by the Lessee herein, his heirs or assigns; the insurance on said building to be written from time to time in a sufficient amount to cover the building risk as said building is constructed.

Not to commit or suffer any waste upon said premises; to peacably and quietly deliver up the same to the said Lessor, his heirs, assigns, at the expiration of said term, or sooner determination of this lease.

That the said Lessor, his heirs or assigns, shall have the first lien upon every right and interest of the Lessee and all claiming under said Lessee, to or in the said premises and the improvements thereon, to secure the payment of said rents and insurance premiums and the performance of the Lessee's covenants herein.

And the said Lessor, for himself and for his heirs, executors, administrators and assigns, covenants and agrees to and with the said Lessee, his heirs and assigns, that, paying the rents and performing the covenants aforesaid, they shall and may peaceably and quietly have and enjoy the aforesaid premises, with the appurtenances, for and during the term aforesaid, free from any let or hinderance by any person or persons whatsoever; and further, that (all rents, taxes and assessments being paid, and all covenants being performed by said Lessee, as herein stipulated) said Lessor, his heirs and assigns, will convey the said premises to the said Lessee, his heirs and assigns, by a good and sufficient deed of general warranty, with release of dower, upon the payment to him or them by said Lessee, his heirs or assigns, during the thirty-first year of the term of this demise, i. e., during the year beginning June 1, nineteen hundred and fifty-five (1955) and ending May 31, nineteen hundred and fifty-six (1956), of the sum of Six Hundred Thousand Dollars ($600,000.) in lawful money of the United States of America. If the Lessee, his heirs or assigns, shall exercise this option or privilege of purchase, then and in that event the demised premises shall as hereinbefore provided for be conveyed by good and sufficient deed of general warranty with release of dower, the title to the said premises to be good and marketable, clear, free and unincumbered, save and except as to this lease, and save and except as to the taxes, rates, charges and assessments which under the terms and conditions of this lease are payable by the Lessee; also except as to any acts of commission and omission on the part of the Lessee.

It is hereby further stipulated and agreed by and between the parties hereto, that, within six (6) months from and after the date hereof, the Lessee shall commence the construction, shall thereafter construct and on or before May 31, nineteen hundred and twenty-six (1926) complete the construction, on the demised premises, of a commercial building to cost not less than Two Hundred and Fifty Thousand Dollars ($250,000.), and to be not less than three (3) stories in height, and which building, if not more than three (3) stories in height, shall be so constructed that two or more stories may be added to the same, and which building, if not more than four (4) stories in height, shall be so constructed that one or more stories may be added to the same. The plans and specifications for the said building shall first be submitted to the Lessor for his approval.

WHEREAS, however, the City of Cincinnati has planned and is contemplating adopting and is about to adopt or pass the necessary legislation to widen Fifth Street, by appropriating twenty-five (25) feet, more or less, off the Northerly side or part of the demised realty, i. e., along the entire front of said property on the Southerly side of Fifth Street, it is agreed, stipulated and provided that such building to be erected on the demised premises by the Lessee herein may be so erected with due regard to the planned and (or) contemplated use of the Northerly part thereof to the extent that twenty-five (25) feet, more or less, thereof, are likely to be or may be appropriated by the City of Cincinnati for the widening of said Fifth Street; and that, pending actual and final appropriation of any such part of the said demised premises by the said City of Cincinnati, and (or) in case no such appropriation ultimately be made, the Lessee herein, his heirs or assigns, may make any and all proper and suitable use of said part of said demised premises for and in connection with the remaining part of the demised premises and (or) with the building to be erected by the Lessee herein on the remaining part of the said demised property, and (or) for constructing or erecting a proper and suitable addition or annex to the said building, or constructing or erecting a separate, proper and suitable building thereon.

In case such appropriation be made, then and in that event the entire sum of money or compensation which may be awarded for such appropriation of the said part of the demised realty with improvements, if any, and for damages to the residue thereof shall be paid unto the Lessee herein, his heirs or assigns, unless said appropriation and condemnation be made during the first year of this lease, and (or) before the building has been completed as herein provided, in which event the money so to be paid by the City of Cincinnati as compensation for the property taken to widen Fifth Street and (or) for damages to the residue thereof, shall be paid to the Lessor herein, his heirs or assigns, and held by him or them as security until the said building has been completed and all bills for material furnished and labor performed have been paid by said Lessee, his heirs or assigns, as well as all costs, expenses and attorneys' fees in the defense (to be conducted by the Lessee, his heirs or assigns) of the condemnation proceedings which are to be paid by the Lessee; and said Lessor, his heirs or assigns, shall pay said Lessee, his heirs or assigns, interest at the rate of four (4) per cent per annum during the time said money shall be held by said Lessor, his heirs or assigns, and until said building is completed and said payments are made, as above provided, at which time the said Lessor, his heirs or assigns, shall pay to the said Lessee, his heirs or assigns, said money received by said Lessor, his heirs or assigns, from said City of Cincinnati, with interest at four (4) per cent per annum.

It is further provided that the Lessee herein shall, simultaneously with the execution and delivery of this lease, pay unto the Lessor herein the sum of Eight Thousand Dollars ($8,000.), which, together with the Ten Thousand Dollars ($10,000.) heretofore paid by said Lessee to said Lessor at the time of the acceptance by said Lessor of a certain assignment to said Lessee of an option on the above described premises by The Burgess, Droege & Spilker Company, namely, on January 3, 1925, makes a sum of Eighteen Thousand Dollars ($18,000.) paid to said Lessor by said Lessee up to and including the date of the execution of this lease, which said sum of Eighteen Thousand Dollars ($18,000.) shall be held by said Lessor, his heirs and assigns, as security for the faithful performance of all the covenants and agreements to be done and performed by said Lessee; and on the completion of said building and the payment of all bills by said Lessee, his heirs or assigns, for materials furnished and labor performed, the said sum of Eighteen Thousand Dollars ($18,000.) shall be applied by said Lessor, his heirs or assigns, to the payment of ground rents then due or taxes and insurance premiums that may be due and payable under the terms and provisions of this lease, and any balance remaining in the hands of said Lessor, his heirs or assigns, after said payments are made, shall at that time be returned to said Lessee, his heirs or assigns.

It is further provided and agreed that there shall be no rent paid on the said demised premises for a period of not longer than six (6) months from the commencement of the construction of said new building on said premises, which abatement of rents shall begin with the quarterly rent-day next succeeding the commencement of the construction of said new building, but said Lessee shall pay said quarterly rents as they become due and payable up to the time when said abatement begins, as above provided, and shall resume payments after the expiration of said six months abatement period.

PROVIDED, however, and these presents are upon these express conditions, that if, at any time, the rent aforesaid or any part thereof shall be in arrear, or unpaid, for the space of thirty (30) days after the same shall have become due and payable, and after demand of payment made personally or on said premises, which demand shall be equally good and effectual, whether made on the day of payment, or at any time afterward; or, if the said Lessee, his heirs, executors, administrators or assigns, shall fail to pay said taxes, rates, charges and assessments, or any part thereof, as the same become payable, or shall fail faithfully to keep and perform any other covenant or agreement herein contained, then, or in either such case, this lease (if the said Lessor, his heirs, executors, administrators or assigns so elect) shall cease, determine, and be void, and it shall be lawful for him or them to enter upon the said premises with the appurtenances, or any part thereof, in the name of the whole, and the same to occupy and repossess as though this demise had not been made.

IN WITNESS WHEREOF, the said Llewellyn B. Reakirt, Lessor herein, and the said Walter J. Friedlander, Lessee heirs, together with Grace C. Reakirt, the

Plaintiff's Exhibit No. 2

wife of the said Llewellyn B. Reakirt, and who, the said wife, joins in the execution of this lease for the purpose of agreeing and consenting to the terms and conditions thereof in so far as she as such wife now has or may have any interest or rights, prospective or otherwise, in and to the demised premises, and (or) in as far as she may hereafter have any interest or rights in and to the demised premises as widow of the Lessor, should she survive her said husband, have set their hands hereunto and to a duplicate hereof, on the date first above written.

Signed and acknowledged
in presence of us:
Milton Sayler,
Oscar Stoehr,
as to Lessor and wife.
Milton Sayler,
Oscar Stoehr,
as to Lessee.

Llewellyn B. Reakirt,
Grace C. Reakirt,
Walter J. Friedlander.

The State of Ohio, }
County of Hamilton. } ss.

BE IT REMEMBERED, That on the 25th day of May, in the year of our Lord one thousand nine hundred and twenty-five (1925), before me, the subscriber, a Notary Public in and for said county, personally came LLEWELLYN B. REAKIRT, the Lessor named in the foregoing lease, and GRACE C. REAKIRT, his wife, and personally came WALTER J. FRIEDLANDER, the Lessee named in the foregoing lease, being all the parties to the said lease and acknowledged the signing thereof to be their voluntary act, for the uses and purposes therein contained.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed my notarial seal, on the day and year last aforesaid.

John H. Monohan,
Notary Public, Hamilton County, Ohio.

PLAINTIFFS' EXHIBIT 3.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

James S. Richards, and
Paschal L. Richards,
Plaintiffs,
vs.
The City of Cincinnati, a municipal corporation under the laws of Ohio,
Defendant.

No. 556 Eq.

STIPULATION AS TO EVIDENCE.

The following statements may be considered as true, if competent. Either side may object to the competency of any statements.

1. The amount of money at present available for the widening of Fifth street from Main street to Pike street is approximately $1,600,000.00.

2. The total expense of appropriating the 25 foot strip including the payment of damages to residue is estimated by the City on its appraisals at from $1,350,000.00 to $2,000,000.00. The property owners claims are considerably in excess of these amounts.

3. The expense of appropriating all the property including the 25 foot strip and the excess is estimated by the City on its appraisals at from $3,500,000.00 to $5,000,000.00. The property owners claims are considerably in excess of these amounts.

4. The two squares of Fifth Street next west of Main Street are in the heart of the city of Cincinnati and a large amount of traffic comes into them and proceeds eastwardly over Fifth street. The width of these two squares is 130 feet from property line to property line; the width of Fifth street from Main street to Pike street is 66 feet from property line to property line. It is proposed to widen this part to 91 feet by adding 25 feet on the south side.

5. Excepting the two squares of Fifth street referred to in 4), two squares of Eighth, known as Garfield Place, Broadway, south of Fourth street, Eggleston Avenue and Central Parkway, the width of streets in the downtown business district of Cincinnati is not in excess of 66 feet from property line to property line.

6. The buildings on the south side of Fifth street from

Plaintiff's Exhibit No. 3

Main to Pike street excepting the buildings on the square from Sycamore to Broadway and on the square from McAllister to Lawrence street are in the main old, and the frontages small in the individual cases.

7. The general average character of the buildings and lot frontages on the north side of Fifth street approximates that on the south side with the exceptions noted in 6.)

J. W. Peck,
Attorney for Plaintiff.
John D. Ellis,
City Solicitor.

PLAINTIFFS' EXHIBIT 4.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Llewellyn B. Reakirt, Plaintiff, vs. The City of Cincinnati, a municipal corporation under the laws of Ohio, Defendant.	No. 557 Eq.

STIPULATION AS TO EVIDENCE.

The following statements may be considered as true, if competent. Either side may object to the competency of any statements.

1. The amount of money at present available for the widening of Fifth Street from Main Street to Pike Street is approximately $1,600,000.00.

2. The total expense of appropriating the 25 foot strip including the payment of damages to residue is estimated by the City on its appraisals at from $1,350,000.00 to $2,000,000.00. The property owners claims are considerably in excess of these amounts.

3. The expense of appropriating all the property including the 25 foot strip and the excess is estimated by the City on its appraisals at from $3,500,000.00 to $5,000,000.00. The property owners claims are considerably in excess of these amounts.

4. The two squares of Fifth Street next west of Main Street are in the heart of the city of Cincinnati and a

large amount of traffic comes into them and proceeds eastwardly over Fifth street. The width of these two squares is 130 feet from property line to property line; the width of Fifth street from Main street to Pike street is 66 feet from property line to property line. It is proposed to widen this part to 91 feet by adding 25 feet on the south side.

5. Excepting the two squares of Fifth street referred to in 4, two squares of Eighth, known as Garfield Place, Broadway, south of Fourth street, Eggleston Avenue and Central Parkway, the width of street in the downtown business district of Cincinnati is not in excess of 66 feet from property line to property line.

6. The buildings on the south side of Fifth street from Main to Pike street excepting the buildings on the square from Sycamore to Broadway and on the square from McAllister to Lawrence street are in the main old, and the frontages small in the individual cases.

7. The general average character of the buildings and lot frontages on the north side of Fifth street approximates that on the south side with the exceptions noted in 6).

Peck, Shaffer & Williams,
Attorneys for Plaintiff.
John D. Ellis,
City Solicitor.

PLAINTIFFS' EXHIBIT 5.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Margaret W. Vester,
Plaintiff,
vs.
The City of Cincinnati, a municipal corporation under the laws of Ohio,
Defendant.
} No. 555 Eq.

STIPULATION AS TO EVIDENCE.

The following statements may be considered as true, if competent. Either side may object to the competency of any statements.

1. The amount of money at present available for the

Plaintiff's Exhibit No. 5

widening of Fifth Street from Main street to Pike street is approximately $1,600,000.00.

2. The total expense of appropriating the 25 foot strip including the payment of damages to residue is estimated by the City on its appraisals at from $1,350,000.00 to $2,000,000.00. The property owners' claims are considerably in excess of these amounts.

3. The expense of appropriating all the property including the 25 foot strip and the excess is estimated by the City on its appraisals at from $3,500,000.00 to $5,000,000.00. The property owners claims are considerably in excess of these amounts.

4. The two squares of Fifth street next west of Main Street are in the heart of the city of Cincinnati and a large amount of traffic comes into them and proceeds eastwardly over Fifth Street. The width of these two squares is 130 feet from property line to property line; the width of Fifth street from Main Street to Pike street is 66 feet from property line to property line. It is proposed to widen this part to 91 feet by adding 25 feet on the south side.

5. Excepting the two squares of Fifth street referred to in 4), two squares of Eight, known as Garfield Place, Broadway, south of Fourth street, Eggleston Avenue and Central Parkway, the width of streets in the downtown business district of Cincinnati is not in excess of 66 feet from property line to property line.

6. The buildings on the south side of Fifth street from Main to Pike street excepting the buildings on the square from Sycamore to Broadway and on the square from McAllister to Lawrence street are in the main old, and the frontages small in the individual cases.

7. The general average character of the buildings and lot frontages on the north side of Fifth street approximates that on the south side with the exceptions noted in 6).

Peck, Shaffer & Williams,
Attorneys for Plaintiff.
John D. Ellis,
City Solicitor.

DEFENDANT'S EXHIBIT A.

A RESOLUTION.

Declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement.

Be It Resolved by the Council of the City of Cincinnati, State of Ohio:

1. That Council hereby declares its intention to appropriate for the purpose of widening Fifth Street from the east side of Main Street to the west side of Pike Street the following described property, to-wit:

Tract No. 1—Beginning at the intersection of the south line of Fifth Street and the east line of Main Street; thence east along the south line of Fifth Street 157.42 feet to the west line of Lawson Alley; thence south along the west line of Lawson Alley twenty-five (25) feet; thence west, parallel to Fifth Street, 157.42 feet to the east line of Main Street; thence north along the east line of Main Street twenty-five (25) feet to the place of beginning.

Tract No. 2—Beginning at the intersection of the south line of Fifth Street and the east line of Lawson Alley; thence east along the south line of Fifth Street 239.51 feet to the west line of Sycamore Street; thence south along the west line of Sycamore Street twenty-five (25) feet; thence west, parallel to Fifth Street, 239.47 feet to the east line of Lawson Alley; thence north along the east line of Lawson Alley twenty-five (25) feet to the place of beginning.

Tract No. 3—Beginning at the intersection of the south line of Fifth Street and the east line of Sycamore Street; thence east along the south line of Fifth Street 414.55 feet to the west line of Broadway; thence south along the west line of Broadway twenty-five (25) feet; thence west, parallel to Fifth Street, 414.24 feet to the east line of Sycamore Street; thence north along the east line of Sycamore Street twenty-five (25) feet to the place of beginning.

Tract No. 4.—Beginning at the intersection of the south line of Fifth Street and the east line of Broadway; thence east along the south side of Fifth Street 170.46 feet to the west line of McAllister Street; thence south along the west line of McAllister Street 25 feet; thence west, parallel to the south line of Fifth Street, 170.46 feet to the east line of Broadway; thence north along the east line of Broadway 25 feet to the place of beginning.

Tract No. 5.—Beginning at the intersection of the south line of Fifth Street and the east line of McAllister Street; thence east along the south line of Fifth Street 161.38 feet to the west line of Lawrence Street; thence south along the west line of Lawrence Street 25 feet; thence west, parallel to the south line of Fifth Street, 161.55 feet to the east line of McAllister Street; thence north along the east line of McAllister Street 25 feet to the place of beginning.

Tract No. 6.—Beginning at the intersection of the south line of Fifth Street and the east line of Lawrence Street thence east along the south line of Fifth Street 281.80 feet to the west line of Pike Street; thence south along the west line of Pike Street 28.23 feet; thence west, parallel to the south line of Fifth Street, 294.91 feet to the east line of Lawrence Street; thence north along the east line of Lawrence Street 25 feet to the place of beginning.

II. That Council hereby declares its intention to appropriate, in excess of the above described property, necessary for said street widening, the following described property, to-wit:

Tract E.—1. Beginning at a point in the east line of Main Street 25 feet south of the south line of Fifth Street; thence east, parallel to the south line of Fifth Street, 157.42 feet to the west line of Lawson Alley; thence south along the west line of Lawson Alley 75.40 feet to the south line of the property belonging to J. S. G. Porter and leased to Theodore A. Kirk et al. by a lease as per Lease Book 159, page 60; thence west along said Porter's south line 157.42 feet to the east line of Main Street; thence north along the east line of Main Street 75.94 feet to the place of beginning.

Tract E.—2. Beginning at a point in the east line of Lawson Alley 25 feet south of the south line of Fifth Street; thence east, parallel to the south line of Fifth Street, 239.47 feet to the west line of Sycamore Street; thence south along the west line of Sycamore Street 124.67 feet to the south line of the property conveyed to Llewellyn B. Reakirt by deed recorded in Deed Book 1315, page 358; thence west along the south line of said Reakirt's property and also the south line of the property conveyed to William E. and Ray S. Fox by affidavit recorded in Deed Book 1234, page 239 and also the south line of the property conveyed to William F. Fox et al.

by deed recorded in Deed Book 185, page 13, 239.20 feet to the east line of Lawson Alley; thence north along the east line of Lawson Alley 124.64 feet to the place of beginning.

Tract E.—3. Beginning at a point in the east line of Broadway 25 feet south of the south line of Fifth Street; thence east, parallel to the south line of Fifth Street, 170.46 feet to the west line of McAllister Street; thence south along the west line of McAllister Street 75.15 feet to the south line of the property conveyed to Arnold Tietig, Jr., et al. by affidavit recorded in Deed Book 1219, page 225; thence west along the south line of the said Tietig property and the property conveyed by the Western and Southern Life Insurance Company by deeds recorded in Deed Book 1345, page 43, and Deed Book 1344, page 63, 80 feet; thence north along the west line of said the Western and Southern Life Insurance Company property two feet to the south line of the property conveyed to Richard Miller by deed recorded in Deed Book 593, page 80; thence west along said Miller's south line 90.27 feet to the east line of Broadway; thence north along the east line of Broadway 73.15 feet to the place of beginning.

Tract E.—4. Beginning at a point in the east line of Lawrence Street 25 feet south of the south line of Fifth Street; thence east, parallel to the south line of Fifth Street, 294.91 feet to the west line of Pike Street; thence south along the west line of Pike Street 84.68 feet to the north line of Buchanan Street; thence west along the north line of Buchanan Street 334.26 feet to the east line of Lawrence Street; thence north along the east line of Lawrence Street 75 feet to the place of beginning.

III. That Council hereby declares that the appropriation of said excess property described in Section 2 hereof is in furtherance of the said widening of Fifth Street as described in Section 1 hereof, and is necessary for the complete enjoyment and preservation of said public use.

(The above property is indicated on plan Accession No. 15676 on file in the Department of Highways.)

Passed July 6, A. D. 1927.

Attest: L. B. Blakemore, Clerk.

Murray Seasongood, Mayor.

Defendant's Exhibit A

COUNCIL OF THE CITY OF CINCINNATI

State of Ohio

Clerk's Office }
City of Cincinnati. }

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 22nd Day of November in the year nineteen hundred and twenty eight.
(Seal)

L. B. Blakemore,
Clerk of Council.
By Robert Franken,
Record and Certification Clerk.

DEFENDANT'S EXHIBIT B.

AN ORDINANCE NO. 155-1928.

To appropriate property for the purpose of widening Fifth street, from the east side of Main street to the west side of Pike street, and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement.

Be It Ordained, by the Council of the City of Cincinnati, State of Ohio, two thirds of all the members elected thereto concurring:

Section 1. That the following described property be, and the same hereby is, appropriated to public use for street purposes for the widening of Fifth street, from the east side of Main street to the west side of Pike street, to-wit:

Tract No. 1. Beginning at the intersection of the south line of Fifth street and the east line of Main street; thence east along the south line of Fifth street 157.42 feet to the west line of Lawson alley; thence south along the west line of Lawson alley twenty-five (25) feet; thence west, parallel to Fifth street, 157.42 feet to the east line of Main street; thence north along the east line of Main street twenty-five (25) feet to the place of beginning.

Defendant's Exhibit B

Tract No. 2. Beginning at the intersection of the south line of Fifth street and the east line of Lawson alley; thence east along the south line of Fifth street 239.51 feet to the west line of Sycamore street; thence south along the west line of Sycamore street twenty-five (25) feet; thence west, parallel to Fifth street, 239.47 feet to the east line of Lawson alley; thence north along the east line of Lawson alley twenty-five (25) feet to the place of beginning.

Tract No. 3. Beginning at the intersection of the south line of Fifth street and the east line of Sycamore street; thence east along the south line of Fifth street 414.55 feet to the west line of Broadway; thence south along the west line of Broadway twenty-five (25) feet; thence west, parallel to Fifth street, 414.24 feet to the east line of Sycamore street; thence north along the east line of Sycamore street twenty-five (25) feet to the place of beginning.

Tract No. 4. Beginning at the intersection of the south line of Fifth street and the east line of Broadway; thence east along the south side of Fifth street 170.46 feet to the west line of McAllister street; thence south along the west line of McAllister street 25 feet; thence west, parallel to the south line of Fifth street, 170.46 feet to the east line of Broadway; thence north along the east line of Broadway 25 feet to the place of beginning.

Tract No. 5. Beginning at the intersection of the south line of Fifth street and the east line of McAllister street; thence east along the south line of Fifth street 161.38 feet to the west line of Lawrence street; thence south along the west line of Lawrence street 25 feet; thence west, parallel to the south line of Fifth street 161.55 feet to the east line of McAllister street; thence north along the east line of McAllister street 25 feet to the place of beginning.

Tract No. 6. Beginning at the intersection of the south line of Fifth street and the east line of Lawrence street; thence east along the south line of Fifth street 281.80 feet to the west line of Pike street; thence south along the west line of Pike street 28.23 feet; thence west, parallel to the south line of Fifth street 294.91 feet to the east line of Lawrence street; thence north along the east line of Lawrence street 25 feet to the place of beginning.

Section 2. That, in furtherance of the public use set forth in Section 1 hereof, and for the more complete enjoyment and preservation of the benefits to accrue from said public use, the following described property be, and the same hereby is, appropriated in excess of the property described in Section 1 hereof:

Tract E—1. Beginning at a point in the east line of Main street 25 feet south of the south line of Fifth street; thence east, parallel to the south line of Fifth street, 157.-42 feet to the west line of Lawson alley; thence south along the west line of Lawson alley 75.40 feet to the south line of the property belonging to J. S. G. Porter and leased to Theodore A. Kirk et al. by a lease as per Lease Book 159, page 60; thence west along said Porter's south line 157.42 feet to the east line of Main street; thence north along the east line of Main street 74.94 feet to the place of beginning.

Tract E—2. Beginning at a point in the east line of Lawson alley 25 feet south of the south line of Fifth street; thence east, parallel to the south line of Fifth street, 239.47 feet to the west line of Sycamore street; thence south along the west line of Sycamore street 124.-67 feet to the south line of the property conveyed to Llewellyn B. Reakirt by deed recorded in Deed Book 1315, page 358; thence west along the south line of said Reakirt's property and also the south line of the property conveyed to William E. and Ray S. Fox by affidavit recorded in Deed Book 1,234, page 239, and also the south line of the property conveyed to William F. Fox et al. by deed recorded in Deed Book 185, page 13, 239.20 feet to the east line of Lawson alley; thence north along the east line of Lawson alley 124.64 feet to the place of beginning.

Tract E—3. Beginning at a point in the east line of Broadway 25 feet south of the south line of Fifth street; thence east parallel to the south line of Fifth street, 170.-46 feet to the west line of McAllister street; thence south along the west line of McAllister street 75.15 feet to the south line of the property conveyed to Arnold Tietig, Jr., et al. by affidavit recorded in Deed Book 1,219, page 225; thence west along the south line of the said Tietig property and the property conveyed to the Western and Southern Life Insurance Company by deeds recorded in Deed Book 1,345 page 43, and Deed Book 1,344, page 63, 80 feet; thence north along the west line of said the Western and Southern Life Insurance Company property two feet to the south line of the property conveyed to Richard Miller by deed recorded in Deed Book 593, page 80; thence west along said Miller's south line 90.27 feet to the east line of Broadway; thence north along the east line of Broadway 73.15 feet to the place of beginning.

Defendant's Exhibit B

Tract E—4. Beginning at a point in the east line of Lawrence street 25 feet south of the south line of Fifth street; thence east, parallel to the south line of Fifth street, 294.91 feet to the west line of Pike street; thence south along the west line of Pike street 84.68 feet to the north line of Buchanan street; thence west along the north line of Buchanan street 334.26 feet to the east line of Lawrence street; thence north along the east line of Lawrence street 75 feet to the place of beginning.

Section 3. That the City Solicitor be, and he hereby is, authorized and directed to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for the several parcels of real estate constituting said tracts, such compensation in the case of parcels taken partly for public use and partly by way of excess condemnation to be apportioned between the parts.

Section. 4. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed March 21, A. D. 1928.

M. Seasongood, Mayor.

Attest: L. B. Blakemore, Clerk.

DEFENDANTS' EXHIBIT B.

COUNCIL OF THE CITY OF CINCINNATI
State of Ohio

Clerk's Office
City of Cincinnati.

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 22nd Day of November in the year nineteen hundred and twenty eight.
(Seal)

L. B. Blakemore,
Clerk of Council.
By Robert Franken,
Record and Certification Clerk.

DEFENDANT'S EXHIBIT S.

AN ORDINANCE No. 318-1927

Providing for the issue of bonds by the City of Cincinnati for the purpose of paying said City's part of the cost and expense of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia Avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street and Martin street, from East Third street to Eden Park drive, in the sum of one hundred and twenty thousand dollars ($120,000.00) (in connection with an issue of bonds heretofore authorized by a favorable vote on the subject of issuing bonds in the sum of $1,000,000.00 for the purposes aforesaid), and also for the purpose of providing funds to pay the interest accruing on said bonds previous to the receipt of taxes from which such interest is to be ultimately paid.

Whereas, At an election held in the City of Cincinnati, Hamilton County, Ohio, on November 2d, 1926, on the question of issuing bonds for five purposes and on increasing the tax levy for the City of Cincinnati, Hamilton County, Ohio, one of which purposes provides for an issue of bonds of the City of Cincinnati for the purpose of paying said City's part of the cost and expenses of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street and Martin street, from East Third street to Eden Park drive, in the sum of one million dollars ($1,000,000.00) and the levy of taxes outside of the existing limitations estimated by the County Auditor to average .071 mill for a maximum period of twenty-five (25) years, and to pay the principal and interest on such bonds; and,

Whereas, More than fifty-five (55) per cent of the voters voting at said election on the question of an issue of bonds by the City of Cincinnati, as above set forth, voted in favor thereof; and,

Whereby, It is hereby determined by this Council that it is necessary at this time to provide a fund of $120,000.00, representing three (3) annual maturities in the

Defendant's Exhibit S

sum of forty thousand dollars ($40,000.00) each being for the years 1928, 1929 and 1930 of said original amount authorized at the election as aforesaid, in accordance with the provisions of this ordinance, for the purpose of proceeding with a portion of the improvements for which authority was given by said vote for the issuing of bonds in the sum of one million dollars ($1,000,000.00); now, therefore,

Be It Ordained by the Council of the City of Cincinnati, State of Ohio:

Section 1. That it is deemed necessary by the Council of the City of Cincinnati, State of Ohio, to issue and sell bonds of said City in the sum of one hundred and twenty thousand dollars ($120,000.00) for the purpose of paying said City's part of the cost and expense of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street, and Martin street, from East Third street to Eden Park drive (in connection with an issue of bonds heretofore authorized by a favorable vote on the subject of issuing bonds in the sum of $1,000,000.00 for the purposes as aforesaid), and also for the purpose of providing a fund to pay the interest accruing on said bonds previous to the receipt of taxes from which such interest is to be ultimately paid.

Section 2. That bonds of said City shall be issued in the sum of one hundred and twenty thousand dollars ($120,000.00), (of which amount the sum of $1,275.00 is the amount included for interest maturing on said bonds previous to the receipt of taxes from which such interest is to be ultimately paid), for the purposes aforesaid. Each of said bonds shall be in such denomination as has been determined by the City Auditor and set forth in this ordinance. Said bonds shall be dated June 1, 1927, and shall be payable in three (3) equal annual installments, with interest thereon at the rate of four and one-quarter per cent (4¼%) per annum, payable semi-annually.

Said bonds shall be in the amounts and dates of maturity as follows:

Amount of Bond	Date of Maturity
$40,000.00	September 1, 1928
$40,000.00	September 1, 1929
$40,000.00	September 1, 1930

and represents the first three annual maturities of a series of twenty-five (25) bonds of like date and tenor, except as to the maturities thereof, aggregating the sum of one million dollars ($1,000,000.00), and all of which maturities are hereby determined to be in substantially equal annual installments.

Said bonds shall be issued, executed and disposed of in accordance with law and the ordinance of this Council to regulate the issue and sale of bonds of the City of Cincinnati, State of Ohio, passed February 27, 1912.

Section 2. The proceeds from the sale of said bonds, except the sum included in the amount of the issues to the extent necessary to provide a fund for the payment of interest maturing on said bonds previous to the receipt of taxes from which said interest is to be ultimately paid, and the premium and accrued interest thereon, shall be credited to a fund for the purpose of paying the City's portion of the cost and expenses of the improvements as set forth in Section 1 of this ordinance, and shall be paid out upon the order of the City Manager, and shall be expended by said City Manager for the purposes specified herein.

Section 4. For the purpose of providing the necessary funds to pay the interest on the foregoing issue of bonds promptly when and as the same falls due, and also to provide a fund sufficient to discharge the said serial bonds at maturity, there shall be and is hereby levied on all the taxable property in the City of Cincinnati, in addition to all other taxes, outside of the limitations of Section 5649-5b of the General Code, and all other limitations upon tax rates provided by law, a direct tax annually during the period of time said bonds are to run in an amount sufficient to provide funds to pay interest upon said bonds as and when the same falls due, and also provide a fund for the discharge of the principal of said serial bonds at maturity, which taxes shall not be less than the interest and sinking fund tax required by Section II, Article XII, of the Constitution.

Said tax shall be and is hereby ordered computed, certified, levied and extended upon the tax duplicate and collected by the same officials in the same manner and at the same time that taxes for general purposes for each of said years are certified, extended and collected. Said tax shall be placed before and in preference to all items and for the full amount thereof. The funds derived from said tax levies hereby required shall be placed in a separate and distinct fund, which, together with the interest collected on the same, shall be irrevocably pledged for the payment of principal and interest on said bonds when and as the same fall due.

Section 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed June 1, A. D. 1927.

Murray Seasongood, Mayor.

Attest: L. B. Blakemore, Clerk.

A copy of this ordinance is on file in the office of the Clerk of Council for public inspection.

COUNCIL OF THE CITY OF CINCINNATI

State of Ohio

Clerk's Office }
City of Cincinnati }

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 26th day of November in the year nineteen hundred and twenty-eight.
(Seal)

L. B. Blakemore,
Clerk of Council,
By Robert Franken,
Record and Certification Clerk.

DEFENDANT'S EXHIBIT T.

LEGAL NOTICE.

Referendum Bonds (Street Widening, Etc.).

Notice is hereby given that on the 1st day of September, 1926, Council of the City of Cincinnati, State of Ohio, passed the following:

A RESOLUTION.

Electing to submit to a vote of the people a $1,000,000.00 City of Cincinnati, Ohio, General Street Improvement Bond Issue for the purpose of paying the city's part of the cost and expense of improving sundry existing streets by widening and extending such streets, and by purchasing and condemning any land necessary for widening and extending such streets, and including the construction of viaducts and retaining walls as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street to Eden Park drive.

Be it resolved by the Council of the City of Cincinnati, State of Ohio:

Section 1. That the necessity of a bond issue in the sum of one million dollars ($1,000,000.00) for the purpose of paying said city's part of the cost and expense of improving sundry existing streets by widening and extending such streets, and by purchasing and condemning any land necessary for widening and extending such streets and including the construction of viaducts and retaining walls as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street; Martin street, from East Third street to Eden Park drive, maturing in equal or substantially equal annual installments for approximately twenty-five (25) years and of the levy of a tax outside of the limitations of Section 5649-5b, General Code, and all other limitations upon tax rates prescribed by law, to pay the interest on and to retire said bonds, is hereby set forth.

Said bonds shall be dated approximately July 1, 1927, and shall mature in equal or substantially equal annual installments for twenty-five (25) years, and shall bear interest not to exceed six per cent (6%) per annum, payable semi-annually.

Section 2. This resolution shall be certified to the County Auditor on or before September 2, 1926. Thereupon and prior to September 11, 1926, the County Auditor shall calculate the average annual levy throughout the life of the bonds which will be required to pay the interest on and retire such bonds, assuming that the amount of the tax list of the subdivision of the City of Cincinnati remains the same throughout the life of said bonds as the amount of the list for the current year, and if this is not determined the estimated amount submitted by the County Auditor to the County Budget Commission.

The County Auditor shall, prior to September 11, 1926, certify the amount of such average to this Council.

Defendant's Exhibit T

Thereupon this Council, if it desires to proceed with the issue of said bonds, shall, prior to September 21, 1926, certify this resolution, together with the amount of the average tax levy estimated by the County Auditor and the maximum number of years required to retire the bonds to the Deputy State Supervisors of Elections of the county, and they shall prepare the ballots and make other necessary arrangements for the submission of the question to the voters at the ensuing November election.

The election on said question shall be held at the regular places of holding elections in the City of Cincinnati at the November, 1926, election, and shall be conducted, canvassed and certified in the same manner as regular elections in the taxing district of the City of Cincinnati for the election of officers thereof. Notice of the election shall be published in one or more newspapers printed and of general circulation in the City of Cincinnati once a week for four (4) consecutive weeks prior thereto, stating the amount of the proposed bond issue, the purpose for which it is to be issued, and the maximum number of years during which such bonds shall run, and the estimated average additional rate outside of the limitations of Section 5649-5b, as certified by the County Auditor.

Section 3. The form of the ballots cast at such election shall be as follows:

"For an issue of bonds by the City of Cincinnati for the purpose of paying said city's part of the cost and expenses of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street, and Martin street, from East Third street to Eden Park drive, in the sum of one million dollars ($1,000,000.00) and the levy of taxes outside of the existing limitations estimates by the County Auditor to average ——— mills for a maximum period of twenty-five (25) years, and to pay the principal and interest on such bonds, Yes."

"For an issue of bonds by the City of Cincinnati for the purpose of paying said city's part of the cost and expense of improving sundry existing streets by widening and extending such streets, and by purchasing or condemning any land necessary for widening and extending such streets, including the construction of viaducts and retaining walls, as follows: Columbia avenue, from Torrence road to Pike street, via Kemper lane; Gladstone avenue and East Third street, and Martin street, from East Third street to Eden Park drive, in the sum of one million dollars ($1,000,000.00), and the levy of taxes outside of the existing limitations estimated by the County Auditor to average ——— mills for a maximum period of twenty-five (25) years and to pay the principal and interest on such bonds, No."

Passed September 1, A. D., 1926.

Murray Seasongood, Mayor.

Attest: L. B. Blakemore, Clerk.

A copy of this resolution is on file in the office of the Clerk of Council for public inspection.

COUNCIL OF THE CITY OF CINCINNATI

State of Ohio

Clerk's Office,
City of Cincinnati,

I Hereby Certify that the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 27th Day of November, in the year nineteen hundred and twenty-eight.

L. B. Blakemore,
Clerk of Council,

By ....
Record and Certification Clerk.

(Seal)

DEFENDANT'S EXHIBIT T-1.

(Seal) Cincinnati, November 22, 1926.

Hon. L. B. Blakemore, Clerk,
Council of the City of
Cincinnati, Ohio.

Dear Sir:—

I, Anna Marcus, duly appointed and qualified Clerk of the Board of Deputy State Supervisors and Inspectors of Elections of Hamilton County, Ohio, hereby certify the following to be a true and correct abstract of the vote

Defendant's Exhibit T-1

cast at the election held in the City of Cincinnati on November 2nd, 1926 on the following propositions:

$1,000,000.00		
Streets Improvement	Yes received	64196
Auburn Ave. et al.	No	27305
$1,000,000.00		
Street Widening	Yes	57282
Columbia Ave. et al.	No	32580
$1,250,000.00		
Parks, Boulevards &	Yes	51808
Playgrounds	No	36713
$985,000.00		
University of	Yes	47647
Cincinnati	No	40769
$1,000,000.00		
Grade Crossing	Yes	66909
Eliminations	No	23814
Total Vote Cast		114660

Respectfully submitted,
(Signed) **Anna Marcus,**
Clerk.

COUNCIL OF THE CITY OF CINCINNATI

State of Ohio

Clerk's Office,
City of Cincinnati,

I Hereby Certify, That the foregoing Transcript is correctly copied from the books, papers and journals of the City of Cincinnati, kept under authority and by direction of the Council thereof, and that the foregoing was ordered filed by the Council of the City of Cincinnati, Ohio, on November 24th, 1926.

In Testimony Whereof, I have hereunto set my name and affixed the seal of the Clerk's office this 27th Day of November, in the year nineteen hundred and twenty-eight.

L. B. Blakemore,
Clerk of Council,
By Robert Franken,
Record and Certification Clerk.

(Seal)

CLERK'S CERTIFICATE.

I, Harry F. Rabe, Clerk of the District Court of the United States for the Southern District of Ohio, Western Division, do hereby certify that the foregoing pages contain a true and correct copy of those portions of the record and proceedings indicated in the Praecipe found on page 72 hereof, as the same appear of record and on file in the office of the clerk of said court in the following cases:

Margaret W. Vester,
v. No. 555
The City of Cincinnati.

James S. Richards and
Paschal S. Richards,
v. No. 556
The City of Cincinnati.

Llewellyn B. Reakirt,
v. No. 557
The City of Cincinnati.

In Witness Whereof, I have hereunto subscribed my name and affirmed the seal of said court, at the City of Cincinnati, this ——— day of ———————, 1929.

(Seal) Clerk.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSES ARGUED AND SUBMITTED

(March 13, 1929—Before: Denison, Moorman and Hicks, JJ.)

These causes are argued together by Mr. John D. Ellis, City Solicitor, and Mr. Ed. F. Alexander, Assistant City Solicitor, for the Appellant, and by Mr. John Weld Peck for the Appellees and are submitted to the Court.

DECREE

No. 5343

(Filed June 6, 1929)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

DECREE

No. 5344

(Filed June 6, 1929)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

DECREE

No. 5345

(Filed June 6, 1929)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

OPINION

Nos. 5343-5344-5345

(Filed June 6, 1929)

Before DENISON, MOORMAN and HICKS, Circuit Judges.

MOORMAN, Circuit Judge: In March, 1928, the appellant, City of Cincinnati, by its council, passed an ordinance to appropriate a strip of land 25 feet in width adjacent to the South line of Fifth Street for the purpose of widening the street. By the same ordinance the city undertook to condemn additional areas adjacent to this strip, on the South side thereof, between Main and Pike Streets, the intersecting streets being Lawson Alley, Sycamore, Broadway, McAllister and Lawrence. The appellees brought separate suits in the district court to enjoin the city from condemning their property lying within this additional area. The cases presented similar questions and were tried together in the court below, in which orders of injunction were issued from which these appeals are prosecuted. They were argued together in this court and will be disposed of in one opinion.

The sole question for decision is whether the property is to be devoted to a public or a private use. A brief description of it is necessary. The Vester lot fronts on Broadway, 44 feet South of Fifth Street, and is therefore 19 feet South of the 25 foot strip which is to be taken for street purposes. Upon this lot there is a brick house of three stories, the lower floor of which is occupied by Mrs. Vester's son, a physician in the active practice of medicine. The Reakirt lot is located at the corner of Fifth and Sycamore Streets, fronting 138.8 feet on Fifth and approximately 150 feet on Sycamore. There is at present a temporary oil-filling station on this lot near the corner, and the remainder of it is used as a parking lot. The 25 foot strip actually to be used for a street is about one-sixth of the lot, but the city proposes to take the entire lot. The Richards lot has a frontage of 23 feet on the South side of Fifth Street and extends

South therefrom to Buchanan Street a distance of 100 feet. The city proposes to take not only the 25 feet on Fifth Street, but the entire lot back to Buchanan. This lot differs from the other two in that in appropriating the 25 feet next to Fifth Street it would be necessary to cut through a building that is now on the lot. The value of this building, however, is not sufficient to differentiate the case in principle from the others.

We note, also, as bearing upon the purpose of the city, that fronting on the South side of Fifth Street, as it is now constructed, betwen Main and Pike Streets, there is a tract owned by the Masonic Temple Company, upon part of which there is a Masonic Building, which is set back 25 feet from the street line. The other part is occupied by a vacant building that is not used in connection with the Masonic Building, the north 25 feet of which is to be taken in the regular condemnation. Another tract on the South side of Fifth between Main and Pike Streets, with like frontage, is owned and occupied by the congregation of the Sisters of St. Joseph. The building on this tract has been set back 25 feet from the present South line of Fifth Street. No part of either of these tracts has been subjected to excess condemnation. It is to be said, however, that the buildings that have been constructed upon them are substantial and attractive.

Fifth Street from Main Street to Pike Street is now 66 feet in width. To its further widening the appellees make no objection, but object to the taking of the excess area. It was stated in the ordinance authorizing the condemnation that this additional area was not to be occupied by the improvement, but was taken "for the more complete enjoyment and preservation of the benefits to accrue from the taking of the 25 foot strip." The answers alleged that the purpose of the taking was to further the appropriate development of the South side of Fifth Street "by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage."

The suits are based upon rights claimed under the Fourteenth Amendment. Under the laws of Ohio the only way in which these questions could be raised was by injunction proceedings. *Railroad* v. *Greenwell,* 69 O. S. 487; *Sargent* v. *Cincinnati,* 110 O. S. 444. It is not, therefore, contended that these proceedings violate Section 265 of the Judicial Code, or that the court is without jurisdiction to restrain the proposed action if it violates constitutional rights.

The appropriating ordinance was enacted pursuant to Article 18 of Section 10 of the Constitution of Ohio.[1] That provision authorizes what is known as "excess condemnation," which, as broadly defined, is the taking by eminent domain of more property than is necessary for the creation of a public improvement, and of subsequently selling or leasing the surplus. The right is claimed in these cases upon three grounds. The first, called the "remnant" theory, is that by taking only such parts of the land as are needed for street purposes, fragments of lots would remain of such size and shape as to render them separately valueless, with the result that the city would be required to pay for the whole, although it only took a part, and with the further result that because of the lack of such value the city would thereafter be deprived of collecting taxes on this property. The second or "protective" theory is that if the city owned the adjacent land, it could sell it under restrictions that would preserve the beauty of the street, and thus permit or facilitate the normal increase in the values of the surrounding property. The third or "recoupment" theory is that the city would be able to dispose of the parts of the property not needed for the street at prices that would enable it to recoup much of the cost of the proposed construction.

The remnants theory, as technically considered, is not applicable to the property here involved. No part of the Vester property is included in the 25 foot strip. Only one-sixth of the Reakirt property is included therein, and the remaining five-sixths is sufficiently large for appropriate building sites for that section of the city. Similarly, what is left of the Richards property, three-fourths, would be valuable and utilizable for purposes suitable to the location of the property. Thus in one case no part of the property is to be occupied by the street, and in each of the others there will be enough left to meet the needs of suitable buildings for that vicinity. Consequently, in none of them can it be said that in assessing damages to the owner the jury would be justified in taking as its criterion the value of the entire tract. It ought not to be held, we think, that, because there would be unusable portions of other adjacent lots, the city should have the right to take property that is usuable merely to join it with those unusuable remnants in order to sell them advantageously.

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[1] "Appropriation in excess of public use. A Municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

The protection theory has no practical aspects and may be entirely disregarded. The proofs do not show that the city has any present plan for beautifying or establishing building restrictions on the South side of Fifth Street. Nor does it appear that the ownership of this property any more than that of the adjoining property is essential to the development or the carrying out as a whole of any plans of that character that the city may hereafter devise. There remains only the recoupment theory. The court below rightly found that it was upon that theory alone that the city was proceeding. It is sought to be justified upon the ground of a public benefit amounting to a public use.

It is to be admitted that under our present methods of living public necessity requires that the citizen be deprived of much of the freedom of use of his property that formerly seemed to inhere in its ownership. There has been, nevertheless, no departure from established principles, but only an application of them to new conditions; and it is the law now, as it always has been, that the due process clause of the constitution applies to the state and all of its agencies. *Railroad Co.* v. *Chicago,* 166 U. S. 226; *Railway* v. *Railroad Co.,* 166 U. S. 557. It is equally well settled that condemnation for a non-public use is a denial of due process of law (*Irrigation District* v. *Bradley,* 164 U. S. 112; *Traction Company* v. *Mining Co.,* 186 U. S. 239); and that whether the use is public or private is a judicial question. *Hairston* v. *Railway Co.,* 208 U. S. 598. This latter question is sometimes difficult of solution. Public benefit has been spoken of by some of the courts as a public use, but properly so only with respect to the case at hand, and where the public interest is so paramount as to require the subject matter for a public use. None of the cases relied upon by the city, some of which are cited in the margin,[2] by analogy or otherwise, holds that such a use as the city proposes to make of these properties is a public use. In none of them has the use been found to be of a public character because of financial benefits to the condemnor or taker, as such, but it uniformly has been made to depend upon a use so dominantly and directly related to the public as to be indispensable to its welfare. That cannot be said in these cases.

We do not say that the city of Cincinnati might not in a proper case take land adjacent to one of its public streets for a lateral support or to preserve the street as such. Neither do we decide that there may not be cases where the remnant would be so small as compared to what was actually needed and taken, that what was needed might not be regarded, in view of what was left, as the equivalent of the entire tract, and thus the entire tract be taken. We consider only these cases before us; and what we decide is that the proposed use is not a public use within the meaning of that term as it heretofore has been held to justify the taking of private property. The provision of the constitution is that the municipality in acquiring property for public use "may, in furtherance of such public use," appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as "shall be appropriate to preserve the improvement made." This would seem to mean in furtherance of the normal use to which the property that is occupied by the improvement is devoted,—here the use and preservation of the street for the purposes of travel. If it means, as the city here contends, that property may be taken for the purpose of selling it at a profit and paying for the improvement it is clearly invalid.

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[2] *Blair* v. *Cummings County,* 111 U. S. 363; *Head* v. *Manufacturing Co.,* 113 U. S. 9; 198 U. S. 361; 200 U. S. 527; *Hairston* v. *Railway Co.,* 208 U. S. 599.

It is of course true that great deference should be paid to the decisions of the courts of a state in determining what is a public improvement. *Hairston* v. *Railway, supra; Lime Co.* v. *Railway Co.,* 233 U. S. 211; *Jones* v. *Portland,* 245 U. S. 217. This rule, though, does not extend, as the city seems to claim, to legislative action, since, as has been said, the question of the character of the use is one for the courts. Neither is the adoption of excess condemnation by foreign countries and by several of the states of the union a matter of importance in these cases, because whether the use is public or private depends necessarily upon the facts relating to the particular subject matter involved. *Irrigation Company* v. *Bradley,* 164 U. S. 113. Moreover, the constitutional rights here relied upon bring about a further lack of relevancy in the practice as carried on in foreign countries. And as respects the legislative action of the states we have been referred to no decision where any such statute has been sustained. The question has not been adjudicated in the Ohio courts. The courts of last resort in Massachusetts, New York, Virginia and Pennsylvania have held that the statutes of those states, at least for the purposes here involved, were a denial of due process of law. *Old Dominion Land Co.* v. *United States,* 269 U. S. 55, is distinguishable from these decisions and from the present cases in that in that case the land was actually devoted to a public use at the time condemnation proceedings were filed. It was also needed for that use at that time and would be needed for it for at least a considerable time thereafter, and it could not be so used except by a taking. We do not hold that the provision of the state constitution might not be validly enforced in a proper case, but that as applied by the city in these cases it violates the due process clause of the constitution.

Decrees affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the cases of *City of Cincinnati* v. *Margaret W. Vester,* No. 5343; *City of Cincinnati* v. *Jas. S. Richards et al.,* No. 5344; *City of Cincinnati* v. *Llewellyn B. Reakirt,* No. 5345, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of June, A. D. 1929.

J. W. Menzies

[seal] Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1929

No. 372

THE CITY OF CINCINNATI, Petitioner,

vs.

MARGARET W. VESTER

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1929

No. 373

THE CITY OF CINCINNATI, Petitioner,

vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States, October Term, 1929

No. 374

The City of Cincinnati, Petitioner,

vs.

Lewellyn B. Reakirt

Order Allowing Certiorari—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE C
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Supreme Court of the United States

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

No. 372 vs.

MARGARET W. VESTER.

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

No. 373 vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS,

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

No. 374 vs.

LLEWELLYN B. REAKIRT.

Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth District and Brief in Support Thereof.

John D. Ellis,
City Solicitor.
Ed. F. Alexander,
Assistant City Solicitor.
Attorneys for Petitioner.

COURT INDEX PRESS, CINCINNATI, OHIO : : AUGUST, 1929.

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United States Supreme Court

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
MARGARET W. VESTER.

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
JAMES S. RICHARDS and PASCHAL L. RICHARDS.

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
LLEWELLYN B. REAKIRT.

PETITION FOR WRITS OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Your petitioner, the city of Cincinnati, a municipal corporation organized under the laws of the state of Ohio, respectfully represents to this Honorable court;

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

(1) Article XVIII, Section 10 of the Constitution of the state of Ohio provides as follows:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

(2) The city of Cincinnati purposes to widen one of its main down-town streets, East Fifth street, by adding 25 feet to the south side thereof from Main street east to Pike street, a distance of about 1,636 feet. In pursuance of the power granted to it by the aforesaid constitutional provision, the council of the city of Cincinnati by proper resolutions and ordinances appropriated in their entirety all the parcels of real estate abutting the south side of said Fifth street between Main street and Pike street and also five small parcels not abutting said south side of Fifth street but lying within a line drawn one hundred (100) feet south of said south line. Of said parcels so appropriated, a

strip twenty-five (25) feet in width extending from said Main street to said Pike street was taken for the direct purpose of widening said Fifth street, the remainder was taken by way of excess condemnation as authorized by said Section 10 of Article XVIII of the Constitution of Ohio.

(3) Thereafter, your petitioner through its city solicitor applied according to the Ohio statutes to the Court of Common Pleas of Hamilton county, Ohio, in or about April, 1928, to have a jury impaneled to hear testimony as to the value of the said parcels of real estate so appropriated and to assess the compensation payable by your petitioner for said parcels.

(4) Thereafter, the respondents Vester, Richards and Reakirt, being the owners respectively of three parcels of real estate appropriated by your petitioner, filed separate bills in equity in the District Court of the United States for the Southern District of Ohio, Western Division, Nos. 555, 556 and 557, in Equity, seeking to enjoin your petitioner from appropriating any part of their said parcels not included within said twenty-five foot strip to be used directly for said street widening. These cases were heard together by the District Court.

(5) Thereafter, the District Court of the United States for the said Southern District of Ohio granted the prayers of the said respondents and perpetually enjoined your petitioner from proceeding to appropriate such part of respondents' real estate as was appropriated by way of excess condemnation.

(6) Thereafter, your petitioner filed in the Circuit Court of Appeals of the United States for the Sixth Circuit its appeals from said decision of the District

Court being numbered 5343, 5344, and 5345 on the docket of said Circuit Court of Appeals, which said appeals were heard together on one record.

(7) Thereafter, to-wit, on June 6, 1929, the said Court of Appeals for the Sixth Circuit affirmed the said decision of the District Court for the Southern District of Ohio.

(8) Your petitioner presents herewith as a part of this petition, a certified copy of the transcript of the record, including all proceedings in said causes in said District Court and said Circuit Court of Appeals.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

Your petitioner is advised and believes that said judgments of the Court of Appeals for the Sixth Circuit are erroneous and that this Honorable Court should require said cases to be certified to it for its determination as provided in paragraph (a), of Section 240 of the Judicial Code, for the following reasons:

(1) Approximately fifteen states of the American Union and a large number of foreign countries have determined that in the making of public improvements, in particular, large improvements, such improvements can be best handled and the most beneficial results obtained for them by applying the principle of excess condemnation.

(2) The decision of the Circuit Court of Appeals, if allowed to stand, will make impossible in the United States the application of said principle of excess condemnation, contrary to the will of the people of the

sovereign states of Massachusetts, New York, Wisconsin, California, Michigan, Virginia, Rhode Island, and Ohio as expressed in their state constitutions and contrary to the statutory provisions of other states.

(3) In deciding against the city of Cincinnati in the said causes, the lower courts have based their decisions on a narrow and unwarranted interpretation of "due process of law" and "public use" at variance with the spirit of the decisions heretofore handed down by the Supreme Court.

(4) The courts below have rendered Section 10 of Article XVIII of the Ohio Constitution ineffective without in terms declaring it invalid. If said section is invalid the Supreme Court should so declare it in order that confusion may be avoided and necessary adjustments made.

(5) The people of Ohio and of the other sovereign states of the American Union whose statutes and constitutional provisions have been rendered ineffective by the said decision of the Circuit Court of Appeals herein, should have the same right to have the judgment herein reviewed by the highest court of the land which they would have by writ of error or appeal in accordance with paragraph (b) of Section 240 of the Judicial Code, had said Circuit Court of Appeals directly declared said provision of the Constitution of Ohio repugnant to the Constitution of the United States.

Wherefore, your petitioner respectfully prays that writs of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals of the Sixth Circuit, commanding said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in said cases, entitled "The City of Cincinnati, a municipal corporation, vs Margaret W. Vester, No. 5343," "The City of Cincinnati, a municipal corporation, vs James S. Richards and Paschal L. Richards, No. 5344," and "The City of Cincinnati, a municipal corporation, vs Llewellyn B. Reakirt, No. 5345," to the end that said cases may be reviewed and determined by said court as provided by Section 240 of the Judicial Code and that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate, and in conformity with said provisions of the Judicial Code, and that the said judgments of the said Circuit Court of Appeals in said cases, and every part thereof, may be reversed by this Honorable Court.

THE CITY OF CINCINNATI,
John D. Ellis,
City Solicitor.
Ed. F. Alexander,
Asst. Solicitor.
Counsel for petitioner.

Supreme Court of the United States

THE CITY OF CINCINNATI, a Municipal Corporation,

Petitioner,

vs.

MARGARET W. VESTER.

THE CITY OF CINCINNATI, a Municipal Corporation,

Petitioner,

vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS.

THE CITY OF CINCINNATI, a Municipal Corporation,

Petitioner,

vs.

LLEWELLYN B. REAKIRT.

BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Southern District of Ohio, Western Division in these cases was filed November 28, 1928, R., p. 26.

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed June 6, 1929, R., p. 103.

To the best of petitioner's knowledge the opinions have not as yet been officially reported.

II.

Jurisdiction.

(1) It is claimed that this court has jurisdiction of this cause under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stats., 938.

(2) The date of the decrees to be reviewed is June 6, 1929 (Rec., pp. 101, 102).

III.

Statement of the Case.

The facts in each case are identical with the exception of certain facts relating to the location and physical condition of the several plaintiffs' parcels of land.

Acting under the authority of the Constitution of the state of Ohio, the council of the city of Cincinnati on July 6, 1927, passed a Resolution "Declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement." (Rec., p. 85, Defts. Ex. A.)

On March 21, 1928, Council passed Ordinance No. 155-1928 appropriating the property and directing the City Solicitor to apply to a court of competent jurisdiction to have a jury impaneled to assess compensation. (Rec., p. 88, Defts. Ex. B.)

On May 4, 1928, the City Solicitor filed such an application in the Common Pleas Court of Hamilton county, Ohio.

The three plaintiffs below thereupon filed suits in the United States District Court to enjoin the city from proceeding with the appropriation proceedings.

The appropriation proceedings taken by the city were in strict conformity with the statutes of Ohio. (See Ohio General Code, Secs. 3677, 3679, 3680, 3681, 3682.) There is no claim in these cases that the city failed in any respect to comply with the law of Ohio relating to the procedure for the appropriation of property.

The purpose of this appropriation was the widening of East Fifth street from Main street to Pike street by adding to the present width of sixty-six feet a strip of land on the south side thereof twenty-five feet wide. This strip was included in both the resolution declaring intention and the appropriating ordinance. Plaintiffs below make no objection to this appropriation. The resolution and ordinance, however, apply the principle of excess condemnation to this street widening, and, in addition to the twenty-five foot strip, appropriate land immediately adjacent thereto on the south as follows (Plaintiffs Ex. 1, Book of Exhibits):

Main street to Lawson alley, 75 feet, approximately.

Lawson alley to Sycamore street, 124 feet, approximately.

Broadway to McAllister street, 75 feet, approximately.

Lawrence street to Pike street, 75 feet, approximately.

This property constitutes the excess appropriated by the city and is the subject of the present controversy.

The three plaintiffs below are the owners of property located on the south side of Fifth street, from each of whom the city is proposing to appropriate property by means of excess condemnation.

The instant cases present a typical application of the principles of excess condemnation. The two squares of Fifth street in the city of Cincinnati west of Main street, known respectively as Government square and Fountain square may be called the heart of Cincinnati. The width of the street in these two squares is 130 feet from property line to property line. East of Main street, Fifth street becomes a street of 66 feet in width, with a roadway of 40 feet. The street is an important artery for a very large part of the street car and automobile traffic proceeding to the Eastern Hills of the city. Owing to the topography of the city, there is but one main direct approach to the Eastern Hills at the present time. Recently an ambitious plan has been worked out and bonds have been authorized by the electors of the city of Cincinnati for the construction of a large viaduct and boulevard, referred to generally as the Third street-Columbia avenue improvement (Defendant's Ex. R., Book of Exhibits), which is to constitute a new main highway to the eastern hills, proceeding farther to the east before turning north. Fifth street from Main street, for a distance of five squares east, will form a part of the most direct approach to this proposed boulevard.

In anticipation of these plans, the city several years ago determined to increase the width of this portion of Fifth street by adding twenty-five feet on the south side, the north line of the street being a continuation of the north line west of Main street. Pursuant to the city's plan, two magnificent buildings, to-wit, the Masonic Temple and the Fontbonne building, each occupying a full square on the south side of Fifth street, have been erected and set back to the proposed building line. The people of the city of Cincinnati in 1925, by popular vote, authorized the issue of two million dollars worth of municipal bonds for the purpose of improving and widening East Fifth street.

Funds being thus available, the Council of the city of Cincinnati had two alternatives with reference to this improvement, to-wit, the old method of appropriating merely the twenty-five foot strip and paying damages to residue, and the new method of excess condemnation. The old method would have necessitated the buying, in each case, of the front or most expensive part of the property, and the paying of damages for buildings mutilated, and, in most cases, ruined. The results of the application of this method would be to leave standing along the south side of Fifth street a row of ruined and patched-up buildings which would have the right to stand as long as they did not become a public menace. The only hope for relief from this situation would depend upon the gradual processes of private bargaining between business and industry on the one side, and on the other, the avarice of small owners unable and unwilling themselves to make any substantial improvements.

On the other hand, the city was authorized by the state constitution to use the powers of excess condemnation. This involved a consideration of advantages and disadvantages. On the one hand, the use of this method would give the city control of the reconstruction of the south side of Fifth street. It could aggregate the small tracts of land and then dispose of them in lots of such size as would be appropriate to the business and other uses for which the widened Fifth street would be adapted. It could likewise, in disposing of such lots, subject them to any restriction which would be suitable under the circumstances.

On the financial side, council had to consider whether the application of excess condemnation would result in a public benefit. If the city could be sure that the net cost from using excess condemnation would be no greater than the net cost from condemnation by the old method, the advantages resulting to the city from having made available adequate tracts in the downtown district for much needed purposes, and at the same time, securing for the widened highway fitting buildings, would of itself decide the matter in favor of excess condemnation, with the hope, however, that the city would be able to recoup a fair part of the expense of this improvement by reason of the resale value of the surplus property condemned.

A glance at the plat (Pff's Ex. 1, Book of Exhibits) will show that council in laying out its excess condemnation district adopted a reasonable method. It took, in their entirety, every parcel of property from Main to Pike street fronting on the south side of Fifth street, excepting the Masonic Temple building and the Fontbonne building to which reference has heretofore been made. In addition it took three small lots on the east side of Broadway south of Fifth street not abutting on Fifth street, but lying within 100 feet of it, and similarly it took two small tracts on the west side of Pike street lying within 100 feet of Fifth street.

In each case it is claimed by the property owners that the taking of the excess violates the provisions of the Fourteenth Amendment of the Federal Constitution. No objection is raised to the taking of the twenty-five foot strip.

IV.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in holding that the plaintiffs below were denied due process of law as provided by the Fourteenth Amendment of the federal constitution.

(2) The Circuit Court of Appeals erred in holding that the taking of the excess property is not a taking for public use.

V.

ARGUMENT.

1. *The Writs should be Granted because of the Importance of the Question Involved.*

Excess condemnation is new in the federal courts. This is the first case in which its validity under the federal constitution has been questioned. It is not new, however, either in theory or practice. Eight states have by their constitutions authorized excess condemnation, as follows:

Massachusetts, 1911, Art. 70 (rearrangement).
Massachusetts, 1915, Art. 66 (rearrangement).
Ohio, 1912, Art. XVIII, Sec. 10.
Wisconsin, 1912, Art. XI, Sec. 3-a.
New York, 1913, Art. I, Sec. 7.
Rhode Island, 1916, Art. XVII.
Michigan, 1928, Art. XIII, Sec. 5.
California, 1928, Art. I, Sec. 14½.
Virginia, 1928.

The public importance of the present cases becomes immediately apparent when we consider that the decree of the Circuit Court of Appeals renders ineffective the constitutional provisions of these eight states. It is true that in its opinion the court stated, "we do not hold that the provisions of the state constitution might not be validly enforced in a proper case" (Rec., p. 108), but we submit that no type of excess condemnation can be stated that is not fairly tested in the three cases at bar. We are unable to understand the court's suggestion that the constitutional provision of Ohio means a condemnation of excess land in furtherance of the "use and preservation of the street for the purposes of travel" (Rec., p. 108). Such an interpretation, we submit, renders the provision either meaningless or useless. The court referred to a condemnation of extra land necessary for lateral support (Rec., p. 107). But as the District Court pointed out (Rec., p. 27), this power the municipality always had and no constitutional provision was needed for its exercise.

The court further suggests (Rec., p. 107) that the constitution may provide for an excess taking of a remnant of land remaining in a lot after improvement. We submit that the Ohio Constitution neither expressly nor impliedly contains such a restriction and that the distinction between the condemnation of remnants and the broad powers granted in the constitution was too well known in 1912 for the framers of the constitution to mean by their language merely the appropriation of a remnant.

As a matter of fact neither our opponents nor either of the lower courts have ever been able to say what the Ohio Constitution means by excess condemnation if it does not mean a taking of land as typified in the cases at bar. The District Court (Rec., pp. 26-27) suggested that Sec. 3677-12 of the General Code of Ohio was passed with reference to the constitutional provision and offered an example of a constitutional use of excess condemnation. Unfortunately for this view, Sec. 3677-12 was passed in 1904 (97 O. L., 333), and its constitutionality was never questioned. The constitutional amendment was adopted by the people in 1912.

We therefore submit that the cases at bar represent true cases of excess condemnation under the Ohio constitution and that they cannot be held invalid without effectively setting aside the provision of the Ohio constitution and similar provisions of seven other state constitutions. The importance and far reaching effect of such a holding require that it have the sanction of the highest court in the land, if valid.

Furthermore, the actual use of excess condemnation in several states has been so widespread that in fairness, a careful consideration of the procedure should be given by the Supreme Court before the effect of the decision herein is permitted to become final. New York

City has used the power in many street widenings, the Sixth avenue widening being the latest one completed. It is a matter of public knowledge and widespread interest that New York is now using excess condemnation in the great Chrystie-Forsyth street opening. Rochester has appropriated excess property in the Devonshire court extension, University avenue, Rocket street opening and Elmwood avenue widening. The city is now planning a large street widening project by means of excess condemnation. The city of Yonkers, N. Y., has held up a similar project owing to the doubt created by the decision herein. Many other cities have completed projects in the assurance that they were acting under provisions of unquestioned validity.

We submit that the fact that eight states have in their constitutions provided for excess condemnation and that the actual practice under these provisions is so widespread and important, requires that the Supreme Court should give consideration to the questions raised under the federal constitution.

2. *The Purposes of Excess Condemnation.*

Excess condemnation is generally considered from three points of view, ordinarily referred to as the remnant theory, protection of the improvement, and recoupment.

(a) *The Remnant Theory.* Frequently in widening a new street fragments of land remain of such shape and character as to render them unusable. This condition injures the city, first, by bringing about the existence of small and inappropriate structures on the widened thoroughfare. In the second place, the city suffers financial loss because in actual practice it will pay the total value of a lot by reason of damage to residue and also because the value of the remnant is so decreased and its use so inappropriate that the possibility of assessment is greatly reduced. The property owners are also injured. The abutting owner has on his hands a remnant not subject to development and that can only be sold to an adjoining owner. The adjoining owner has no frontage and must buy from the remnant owner to protect his land from a use of the remnant that depreciates the value of adjoining lots. Excess condemnation by taking, and paying a fair value for the remnant completely solves these difficulties.

(b) *Protection of the Improvement.* Cities today are spending millions in creating wide thoroughfares as traffic arteries and also as locations for needed buildings of adequate size and appropriate type. Every large city has had the experience of attempting to create a suitable street only to be defeated because the abutting property developed unsightly and uneconomical uses. Boulevards are built at enormous expense and are ruined by back yards, outbuildings, buildings mutilated by the improvement, billboards and other uses that destroy the character of the highway. In New York and Chicago wrecked structures have stood for twenty years after the widening. In Cincinnati, the Central Parkway two years after its opening is still littered with such wrecks. Excess condemnation purposes to remedy such conditions by allowing the city to take the whole lot and resell the excess with such restrictions as will preserve the character of the improvement made by the city.

(c) *Recoupment.* By a resale of the excess land after the improvement is made, the city may at times be able without injustice to anyone, to recoup a portion of the cost of the improvement and thereby reduce the financial burden upon the public at large.

3. *The Circuit Court of Appeals Erred in Holding that Excess Condemnation Violates the Fourteenth Amendment.*

The main part of this branch of the argument is treated under subhead 4, dealing with the question of public use. At this point we simply wish to indicate the implications of the holding of the Circuit Court of Appeals that excess condemnation violates due process of law under the Fourteenth Amendment.

The Fifth Amendment prohibiting the taking of private property for public use without just compensation applies only to the federal government and does not affect the states. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S., 112, 158. It is as an incident to the due process clause of the Fourteenth Amendment, therefore, that excess condemnation has been held unconstitutional by the lower courts.

The theory underlying such a holding must be that the Ohio Constitution in this respect steps beyond the bounds of law and authorizes a purely arbitrary act of oppression. There is no claim in this case that all necessary process is not being pursued in the condemnation proceeding. Compensation is provided for and the usual statutory method is being followed for the determination by a jury of the amount of compensation to be paid, after notice to the property owner and formal trial of the issues of value. Furthermore, no claim is made that the condemnation is being attempted for the benefit of private individuals. Nevertheless, it is contended that, despite this, the condemnation of the excess *per se* violates the law as to due process and that, no matter how perfect the procedure may be nor how adequate the compensation, the excess cannot be taken. We are really considering a question, therefore, as to whether by their constitutional provisions eight states have stepped outside the realm of law under our accepted legal system and have sought to authorize a purely arbitrary act of confiscation.

If it is the Fourteenth Amendment that prohibits excess condemnation, then prior to the enactment of that amendment excess condemnation was constitutional. This of course is too narrow a view of the subject. Due process of law was not new in 1866 and it had a place in our constitutional history long prior to the Fourteenth Amendment. It is equivalent to "the law of the land" of Magna Charta and is a guarantee against acts of oppression by the government. *Davidson* v. *New Orleans,* 96 U. S., 97, 101. In this view, due process, or the law of the land, is a fundamental expression of the principles of liberty and justice which lie at the base of our civil and political institutions. But, like the constitution itself, it is for an "undefined and expanding future," and its application is broad enough to prevent new abuses as well as to permit new uses. As was said in *Hurtado* v. *California,* 110 U. S., 516, 537:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance

> of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

We submit that those states which by their constitutions have adopted excess condemnation, have declared the law of the land. There is nothing arbitrary or oppressive in that practice. Land is taken by a judicial process and compensation is fixed by a jury upon the evidence presented. So far as due process is concerned there is as much here as in any case of eminent domain.

To hold otherwise would be to conclude that the states of New York, Massachusetts, Michigan, Ohio, Rhode Island, Wisconsin, Virginia and California have all in their constitutions violated the basic legal spirit of the age. A necessary corollary would be that the citizens of countries like Great Britain, which use the principle of excess condemnation, do not enjoy the benefits of "due process of law." A second corollary would be that if the people of the United States desire to enjoy the benefits of excess condemnation, they must eliminate from the United States Constitution the protection of "due process of law."

Viewed in this light, we submit that the questions involved in the cases at bar are vital to the several states mentioned above and that the uncertainty created by the decision of the Circuit Court of Appeals should be obviated by a decision of this court.

4. *The Circuit Court of Appeals Erred in Holding that Excess Condemnation is not for a Public Use.*

The Circuit Court of Appeals held that the city is proceeding upon the recoupment theory alone. (Rec.,

p. 106.) We submit that there is no evidence in the record to sustain such a conclusion. The Ohio Constitution contemplates that the city "may sell such excess *with such restrictions as shall be appropriate to preserve the improvement made.*" It must be presumed that the city will proceed in a constitutional manner if it sells the excess. Insofar as it can do so in advance of an actual determination to sell, the city has indicated that its purpose is to provide for such restrictions on possible resale as may be appropriate. In its resolution declaring its intention to appropriate the city declared (Defts Ex. A, Rec., p. 87), that the excess was taken "in furtherance of the said widening of Fifth street * * * and is necessary for the complete enjoyment and preservation of said public use."

The city may never resell the excess. It is not compelled to do so by the constitution. That is a question to be determined in the future. Recoupment can come only from a sale and we submit that until the city by some act evidences an intent to sell, it cannot be said to be proceeding only on a theory of recoupment. The city has declared that it takes the excess to "preserve the said public use" and that is exactly what the Ohio Constitution empowers it to do. It may preserve the public use in many ways; sale with restrictions is one that may be chosen in the future. But we are not warranted upon such a record in discarding every possible use in favor of a use by sale that may, among other things, result in a possible recoupment, and then go a step farther and conclude that recoupment is the only purpose of the appropriation.

The question for the federal court to determine is whether or not the state in declaring excess condemnation to be a public use has reached a conclusion that is logically impossible or unreasonable. See *Old Dominion Land Co. v. U. S.*, 269 U. S., 55, 66.

> "Congress has declared the purpose to be a public use, by implication if not by express words * * *. Its decision is entitled to deference until it is shown to involve an impossibility."

The Supreme Court has in many decided cases held that "public use" is not restricted to actual "use by the public." It has recognized that the history of the law eminent domain is one of development and change and largely within the sound judgment of the states.

In *Strickley* v. *Highland Boy Mining Co.*, 200 U. S., 527, 531, the court say:

> "In discussing what constitutes the public use * * * the court * * * recognized the inadequacy of use by the general public as a universal test."

In *Clark* v. *Nash*, 198 U. S., 361, 369, the court say:

> "This court has stated what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its courts, must in the nature of things be more familiar with such facts and with the necessity and occasion for the irrigation of the land, than can anyone be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weights with the state court."

In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S., 112, 161, the court say:

> "It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use."

See also *Rindge Company et al.* v. *Los Angeles*, 262 U. S., 700, Syl. 1 and 2.

One cannot explain the many decisions of the federal courts on public use in terms of a general use by the public. The court has considered the question on broader grounds and has held the view that "public use" means "public benefit" or "public advantage," and that such a public advantage justifies the exercise of the power of eminent domain.

In *Old Dominion Land Co.* v. *U. S.*, 296 Fed., 20 (C. C. A., 4, 1924), the court held that a condemnation of land by Congress, if considered for the purpose of resale to recoup a financial loss to the government and to prevent an "immense unearned gain to the land owner" was for a public purpose and use. The court said at p. 22:

> "Therefore, assuming that the condemnation was for the sole purpose of salvage of public treasure which would be saved in no other way, it was for a public use."

In *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S., 527, the court sustained a statute of Utah whereby the Mining Company condemned a right-of-way over the land of Strickley for the purpose of constructing an aerial bucket line from the mine to a railroad so that ore might be loaded on freight cars. The court held that the state legislature might determine such a use to be public.

In *Clark* v. *Nash*, 198 U. S., 361, the land of Clark lay between the land of Nash and a river. Acting under a Utah statute, Nash sought to condemn a right of way over Clark's land to bring water to the land of Nash. Clark claimed that this was a private use. The court sustained the statute and held that the use was public.

In *Hairston* v. *Danville & Western Ry.*, 208 U. S., 598, the railway company sought to condemn land belonging to Hairston for the purpose of building a spur track to a tobacco factory. Hairston claimed that this was a private use because the spur served merely a private factory. The court held that the use was a public one.

In *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U. S., 668, private land was appropriated for the Gettysburg National Park. It was claimed that this was not a public use. The court held the use to be public on the ground it tended to enhance the respect and love of the citizen for the institutions of his country.

In *Attorney General* v. *Williams*, 174 Mass., 476, 478-481 (Aff. 188 U. S., 491), the court considered a Massachusetts statute authorizing the condemnation of rights to build to a height of more than 100 feet on Copley Square, Boston. The Massachusetts court held that this was an appropriate exercise of the powers of eminent domain and that the use was public in seeking to promote the beauty and attractiveness of a park.

In the *Appeal of Rees et al.*, 12 Atl., 427, the Pennsylvania court sustained a condemnation as being for a public use by a company organized for the "education of the public by exhibiting artistic, mechanical and horticultural products and providing public instruction in the arts and sciences."

In *Higginson* v. *Nahant*, 11 Allen, 530 (cited with approval in 262 U. S., 700, 708), the Massachusetts court held that a road laid out "with the design to provide access * * * for the public to points or places * * * esteemed as pleasing natural scenery" was a public use.

These cases show the attitude of the courts on the question of public use. They cannot be explained on the ground of use by the public nor on the ground, as stated by the Circuit Court of Appeals in this case (Rec., p. 107), that the use is "so dominantly and directly related to the public as to be indispensable to its welfare."

In the Old Dominion case, financial recoupment was held to be a public use.

In the Strickley case, a private mining corporation was enabled to transport its ore from the mine to the railroad over the land of an intervening owner. The ore was mined and sold for private profit exclusively.

In the Clark case one man was enabled to farm his land more profitably by using the land of an adjoining owner.

In the Hairston case, a railroad company and a tobacco corporation were enabled to increase their earnings by using an intervening owner's land.

In the Gettysburg case, condemnation was justified as furthering a spirit of patriotism.

In the Copley Square case and the Nahant cases esthetic considerations and beauty were held to be public uses.

In the majority of these cases private gain was the primary purpose of the condemnation; the public benefit was incidental thereto. There was no direct use by the public of the land appropriated. The condemnors were private parties. In the instant case, the public itself is appropriating for what it conceives to be the public advantage. No question of private advantage or private purpose is alleged or could be alleged. How then can it be said that such an appropriation is for a private use?

Under these circumstances and in view of the federal cases cited, how can we say that the state of Ohio has reached an impossible or unreasonable conclusion in granting to its cities the right of excess condemnation? The land is to be taken by a judicial process and no private individual can gain any advantage thereby. The purpose of the appropriation falls well within the limits of public benefit as established by the Supreme Court. The prevention of remnant lots is a public benefit. The sale of the surplus property with restrictions as to building lines, building heights, character of use, time limits for construction, character of construction so as to preserve the economic integrity of the improvement as well as to prevent it from becoming an unsightly street, all these are benefits that flow from the plan and that are exclusively public in their nature. No private benefit for any individual can be shown in which the entire body of citizens do not participate. The recoupment of a part of the expense of the general improvement is a benefit that is entirely public in its nature. If such a result obtains, every taxpayer in the city of Cincinnati will derive a direct financial benefit over a period of many years through the decreased cost of the improvement. Viewed in the light of the decided cases, we are unable to see any other than a public benefit or advantage that can result from the exercise of this power granted by the Constitution of Ohio.

5. *The Theory of the Zoning Cases Supports Excess Condemnation.*

In the recent cases of *Euclid* v. *Ambler Realty Co.,* 272 U. S., 365, and *Gorieb* v. *Fox,* 274, U. S., 603, this court sustained the right of municipalities to enforce compulsory zoning systems and street set back lines unless the ordinances were clearly arbitrary and unreasonable.

In the Gorieb case, the court conclude their opinion by saying:

> "Since upon consideration we are unable to say that the ordinance under review is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,' we are bound to sustain it as constitutional. *Euclid* v. *Ambler Co., supra,* p. 395."

These zoning ordinances unquestionably deprive an owner of property rights. For the public benefit, they restrain him from making certain uses of his property which prior to the enactment of the ordinance he was able to make without question. However, the court will not for a mere theoretical right interfere with a reasonable zoning system.

In a very real sense, the ordinary excess condemnation undertaking is a zoning enterprise. The city takes over the small inadequate lots which abut the improvement and, which, as they are left, are unsuited to the improvement and then lays them out and sells them with restrictions which are suitable to the zone created by the improvement. .

Excess condemnation is in fact more equitable than zoning. A good zoning law may sometimes impose a real loss on a property owner who submits rather than resort to litigation. Where excess condemnation is used, the owners are necessarily compensated and eliminated before the zoning is put into effect.

6. *Cases Relied on by the Circuit Court of Appeals to Sustain its Opinion.*

A careful examination of the opinion of the Circuit Court of Appeals will show that the court does not cite one case in which a state statute authorizing the appropriation of private property was set aside by a federal court. The court refer (R., pp. 106-107), to (Fallbrook) *Irrigation District* v. *Bradley,* 164 U. S., 112, and *Traction Co.* v. *Mining Co.,* 186 U. S., 239. The citation for the second of these cases is erroneous, and in view of the incomplete title used, counsel have not been able to trace it. The first case has been heretofore cited in this brief. In that case, the Supreme Court refused to set aside legislation by the state of California authorizing the establishment of irrigation districts in arid and semi-arid territory.

Further on in their opinion the Circuit Court say, R. p. 108,

> "The courts of last resort in Massachusetts, New York, Virginia, and Pennsylvania, have held that the statutes of those states, (referring to statutes authorizing excess condemnation), at least for the purposes here involved, were a denial of 'due process of law.'"

This statement of the court is not accurate. The cases referred to are the following:

The matter of Albany Street, 11 Wend. (N. Y.) 149,
Opinions of Justices, 204, Mass. 607,
Opinions of Justices, 204, Mass. 616,
Opinions of Justices, 211, Mass. 624,
Mutual Life Insurance Co. v. *Philadelphia*, 242 Pa. St. 47,
City of Richmond v. *Carneal*, 129 Va. 388.

In each of these cases, the court interpreted a state statute on the basis of its understanding of its own state constitutional provisions; in none of them was the constitution of the United States relied on, and in none of them was 'due process of law' invoked. In the New York case, handed down in the year 1834, (prior to the adoption of the Fourteenth Amendment), the court arbitrarily held that the legislature had no power to authorize a municipality to take the fraction of an inch more than it intended to use. In Massachusetts, the holdings were that the legislature could not authorize the expenditure of money raised by taxation to purchase property which was not to be directly used for a public purpose. In the Pennsylvania and Virginia cases, the court defined public use as equivalent to 'use by the public,' a definition long since discarded by the federal courts. Furthermore, it is to be noted that the answers to the several decisions in New York, Massachusetts and Virginia have been the adoption of constitutional amendments to specifically confer on the legislatures the power the courts had said they did not possess.

VI

CONCLUSION

In conclusion, counsel for the city of Cincinnati maintain that excess condemnation is a principle of general law, being in essence only a logical development of the principle of eminent domain. When a modern city undertakes a great public improvement, it faces at the start a great real estate and financial problem. It must consider not alone the acquisition of the land actually to be used for the widening. It must consider also the development of the land which will abut the improvement and it must consider the distribution of the financial cost. In times past, the development of the abutting land has been left to uncontrolled chance, often with deplorable results. As to the financing, the public has usually borne the cost and the private owner has reaped the profit.

The modern city seeks to handle its real estate problems in a modern way, viewing the abutting land as essentially part of the improvement, both from the financial and the developmental standpoint. Of what use is a fine harbor improvement, if the abutting shore cannot be used for appropriate piers and wharves? Of what use is a highway to open up a needed area for new homes, if private land owners can prevent the new homes from arising by their avarice, their lack of intelligence or the lack of co-ordination of their forces.

Possibly as a matter of policy, excess condemnation is, in many cases, unwise. So also is the direct use of eminent domain at times unwise. The constitution cannot consider the matter of policy. Its purpose is to protect not against the general application of new legal principles approved by the people or their representatives, but against the arbitrary or tyranical use of power directed at the individual under the guise of law.

Counsel are of the opinion that due process of law is not properly involved here. Where excess condemnation has been incorporated into the constitution of a state, it is literally the "law of the land". "Due process of law" can exist in a state practising excess condemnation as well as in one which does not.

In view of all the foregoing, counsel for the city of Cincinnati respectfully submit that these cases ought to be reviewed by the Supreme Court.

John D. Ellis,
City Solicitor,
Ed. F. Alexander,
Assistant Solicitor,
Counsel for Petitioner.

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CHARLES

Supreme Court of the United States

No. 372

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
MARGARET W. VESTER,
Respondent.

No. 373

THE CITY OF CINCINNATI, a Municipal Corporation,
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LLEWELLYN B. REAKIRT,
Respondent.

BRIEF OF THE CITY OF CINCINNATI, PETITIONER

✓ JOHN D. ELLIS,
CITY SOLICITOR,
✓ ED. F. ALEXANDER,
ASSISTANT SOLICITOR,
Attorneys for Petitioner.

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REPORT OF LOWER COURT OPINIONS

The opinion of the Circuit Court of Appeals (Sixth Circuit), is reported in 33 F. 2d 242. It is printed in the record of this case at page 103.

The opinion of the District Court (So. Dist. of Ohio) appears not to have been officially reported. It may be found in the printed record at page 26.

I. STATEMENT OF THE CASE

Article XVIII, Section 10, of the Constitution of Ohio, provides as follows:

> Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

Acting under the foregoing constitutional authority, the council of the city of Cincinnati on July 6, 1927, passed a resolution "Declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement." (R. p. 85, Defts. Ex. A.)

On March 21, 1928, council passed Ordinance No. 155-1928 appropriating the property and directing the city solicitor to apply to a court of competent jurisdiction to have a jury impaneled to assess compensation. (R. p. 88, Defts. Ex. B.) On May 4, 1928, the city solicitor filed such an application in the Common Pleas Court of Hamilton County, Ohio.

The three plaintiffs below thereafter filed suits in the United States District Court to enjoin the city from proceeding with the appropriation proceedings, on the grounds, first, that the application of the power of eminent domain to their excess property constituted a denial of due process of law, and second, that they were being deprived of the equal protection of the law.

The appropriation proceedings taken by the city were in strict conformity with the statutes of Ohio. (See Ohio General Code, Secs. 3677, 3679, 3680, 3681, 3682.) There is no claim in this case that the city failed in any respect to comply with the law of Ohio relating to the procedure for the appropriation of property.

The purpose of this appropriation was the widening of East Fifth Street from Main Street to Pike Street by adding to the present width of sixty-six feet a strip of land on the south side thereof twenty-five feet wide. This strip was included in both the resolution declaring intention and the appropriating ordinance. Plaintiffs below make no objection to this appropriation. The resolution and ordinance, however, apply the principle of excess condemnation to this street widening, by appropriating also the entire remnant of every parcel truncated by the widening, and, in addition, five small lots fronting on intersecting streets but lying entirely within a line drawn seventy-five feet south of the new street line.

The plat (Bk. of Ex. Pff. Ex. 1), will show that throughout its length, the excess appropriated has a depth of seventy-five feet, with the exception of three parcels in the short half-block from Lawson Alley to Sycamore Street, where the original depth was one hundred and forty-nine feet, leaving an excess of one hundred and twenty-four feet.

The properties of the three plaintiffs present typical cases of excess condemnation as follows:

1. Mrs. Vester's lot fronts twenty-seven feet on an intersecting street, Broadway, having a depth of ninety-nine

feet parallel with and at a distance of nineteen feet from the new south line of Fifth Street (Bk. of Ex. Pff. Ex. 1). It is occupied by an old building (R. p. 18, Bk. of Ex. Defs. Ex. G), and lies entirely within the excess appropriation.

2. The Richards lot lies near Pike Street, fronting twenty-three feet on Fifth Street, and extending back one hundred feet to a twenty foot alley called Buchanan Street. This lot is occupied by an old building which comes to the present street line and would be cut in two by the twenty-five foot line. The remnant would be 23 by 75 feet. (R. pp. 18, 20; Bk. of Ex. Pff. Ex. 1, Def. Ex. E.)

3. The Reakirt property is one of three large lots between Lawson Alley and Sycamore Street which have a present depth of 149 feet. It lies at the corner of Sycamore and is at present not occupied by any permanent building, being used for a gas station and outdoor garage. Its remnant would be 138 by 124 feet. (R. p. 15; Bk. of Ex. Pff. Ex. 1, Def. Ex. L.)

The two squares of Fifth Street in the city of Cincinnati west of Main Street, known respectively as Government Square and Fountain Square may be called the heart of Cincinnati. The width of the street in these two squares is 130 feet from property line to property line. East of Main Street, Fifth Street becomes a sixty-foot street with a forty foot roadway. The street is an important artery for a very large part of the street car and automobile traffic proceeding to the eastern hills of the city. Owing to the topography of the city, there is but one main direct approach to the eastern hills at the present time. Recently an ambitious plan has been worked out and bonds have been authorized by the electors of the city of Cincinnati for the construction of a large viaduct and boulevard, referred to generally as the Third Street-Columbia Avenue improvement. (Bk. of Ex. Defts. Ex. R), which is to constitute a new main direct highway to the eastern hills proceeding further to the east before turning north. Fifth Street from Main Street to Pike Street (a distance of five squares east) will form a part of the most direct approach to this proposed boulevard.

In anticipation of these plans, the city several years ago determined to increase the width of Fifth Street east of Main Street by adding twenty-five feet on the south side, the north line of the street being a continuation of the north line west of Main Street. Pursuant to the city's plan, two magnificent buildings, to-wit, the Masonic Temple (Bk. of Ex. Def. Ex. U), and the Fontbonne Building (Bk. of Ex. Def. Ex. F), each occupying a full square on the south side of Fifth Street, have been erected and set back to the proposed building line. The people of the city of Cincinnati in 1925, by popular vote, authorized the issue of two million dollars worth of municipal bonds for the purpose of improving and widening East Fifth Street.

In undertaking the improvement, the city council determined to make use of the powers of excess condemnation authorized by the state constitution. The arguments in favor of this procedure were, in the main, as follows:

1. In the case of most parcels, the cost of the twenty-five foot strip, plus damages to residue, would almost, if not quite, equal the fair value of the entire parcel.

2. The city by owning the remnant properties could provide directly against the indefinite maintenance on them of unsatisfactory, mutilated or patched buildings; also against other undesirable temporary uses such as billboards, etc., intended to provide minor revenues while the owners carried their property for speculative purposes.

3. By aggregating the various lots, it could provide needed tracts of adequate size for business buildings of various kinds suited to the new improvement.

4. The net result would be that at relatively small cost, the city would, in a comparatively short number of years

have not only a new broad street but also a building development on the south side in harmony with the street improvement.

5. The development on the south side would hasten a corresponding development on the north side.

A glance at the plat (Bk. of Ex. Pff. Ex. 1), will show that in laying out its excess condemnation district council adopted a reasonable method. It took, in its entirety, every parcel from Main to Pike Street fronting on the south side of Fifth Street, excepting the Masonic Temple Building and the Fontbonne Building, to which reference has heretofore been made. In addition it took three small lots on the east side of Broadway south of Fifth Street not abutting on Fifth Street (Bk. of Ex. Def. Ex. G), but lying within one hundred feet of it, and similarly it took two small tracts on the west side of Pike Street lying within one hundred feet of Fifth Street. (Bk. of Ex. Def. Ex. C.)

The District Court enjoined the city from proceeding with its excess appropriation, holding that the taking of the excess was not for a public use and therefore deprived plaintiffs of their property without due process of law. This holding was affirmed by the Circuit Court of Appeals.

II. SPECIFICATION OF ERRORS

The errors complained of in these proceedings may be stated as follows:

1. The Court of Appeals erred in holding that the proposed excess condemnation deprived plaintiffs of their property without due process of law.

2. The Court of Appeals erred in holding that the taking of the excess property was not for a public use.

III. ARGUMENT

Since this is the first time that the constitutionality of excess condemnation has been before a federal court, a brief statement of the general theory and purpose of that method of appropriation may be helpful.

A. The History of Excess Condemnation *

Excess condemnation may be defined broadly as the policy, on the part of a state or city, of taking by right of eminent domain more property than is actually occupied by a public improvement, and of subsequently selling or leasing this surplus.

The first legislation relating thereto appears to have been in New York in 1812. England adopted the principle in 1845, France in 1850, Italy in 1865 and Belgium in 1867. Since that time, largely since 1900, many states of the United States have enacted statutes providing for excess condemnation. The following states have adopted constitutional amendments authorizing it:

Massachusetts, 1911, Art. 70 (rearrangement).
Massachusetts, 1915, Art. 66 (rearrangement).
Ohio, 1912, Art. XVIII, Sec. 10.
Wisconsin, 1912, Art. XI, Sec. 3-a.
New York, 1913, Art. I, Sec. 7.
Rhode Island, 1916, Art. XVII.
Michigan, 1928, Art. XIII, Sec. 5.
California, 1928, Art. I, Sec. 14½.
Virginia, 1928, Sec. 58.

(For the text of these sections, see appendix, pp. 67-70.)

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* Upon the general question of the history, theory and practice of excess condemnation, see:

Excess Condemnation. Robert E. Cushman, D. Appleton, 1917.

Excess Condemnation. A Report by the Committee on Taxation, City of New York, 1915.

Excess Condemnation. A Report Prepared by the Chicago Bureau of Public Efficiency, 1918.

The outstanding historical use of excess condemnation was the establishment of the boulevard system of Paris under the direction of Baron Haussmann during the reign of Napoleon III. Fifty-six miles of streets were planned and constructed on this basis. In London one hundred and three streets have been laid out and built using excess condemnation, chief among them Kingsway, running from the Strand to Holborn, eleven hundred yards long and one hundred feet wide.

In the United States, New York City has used excess condemnation in the opening of Third, Fourth, Sixth, Thirteenth and Fourteenth Streets, Seventh Avenue, Cedar Street, Lewis Street, Exchange Place, Lafayette Place and many other improvements. The city of Rochester has also made extensive use of the method. Other cities have made occasional use of it.

From the foregoing it would appear that both in principle and in practice excess condemnation is fairly well established as a recognized method of handling large public real estate problems in a modern way.

B. The Purpose of Excess Condemnation

In using excess condemnation, legislative bodies generally have in view all of the following three purposes:

1. The avoidance of remnant lots.
2. The preservation and amplification of the improvement.
3. Recoupment of expense from increased values.

1. Avoidance of Remnants

Particularly in the case of appropriations for new streets laid out diagonally across existing lot lines, remnants of land of various sizes and shapes are frequently left, of little or no value to their owners and capable of appropriate use only in connection with adjacent land. If left to the hazards of private bargaining, they are likely to lie neglected or misused for long periods of time. Incidentally, the city usually pays a price adequate to include the remnant while taking only the part used. Furthermore, if a portion of the improvement is to be paid for by assessment on property benefited, the existence of the remnants operates to prevent an intelligent and equitable distribution of the assessment.

By the use of excess condemnation, the city can facilitate the disposition of these remnants to the best public advantage.

2. *Preservation and Amplification of the Improvement*

Our modern era is an era of city planning. New towns are laid out in advance of their use and we attempt to make our old towns more usable by applying the principles of planning and zoning.

Sometimes an improvement fails to render its greatest return because of the narrow basis on which it is made. For example, a city may lay out a broad highway suitable for handsome business and residence buildings, but if the highway is to be handicapped at the start with lot lines at odd angles and of odd sizes and with the drab remains of mutilated and otherwise unsuitable buildings, it will be merely another street, perhaps drearier than those already in existence. Again a highway intended to open up new territory for needed homes may fail of its real purpose, if the city does not take steps to see that the necessary development follows the improvement.

By excess condemnation, a city may often, at little extra expense, not only establish the improvement, but also facilitate and hasten the development of the adjoining area in harmony with the improvement. Surely the achievement of additional convenience in the arrangements for business, industry and residence is a proper public purpose.

3. *Recoupment of Expense*

In the laying out of a real estate subdivision, private developers figure their expense to include cost of land, cost of street, sewer, water and other improvements, and carrying charges such as interest and taxes. Against this they set what they calculate the selling price of the land will be after the improvement. The increment must be large enough to take care of the expense and give them a profit for their efforts. This is sound business and sound sense.

A city does not ordinarily lay out subdivisions, although it is conceivable that the exigencies of the situation may at times require it, and the constitution of Massachusetts (Art. 66) specifically authorizes such a proceeding. However, when a great public improvement such as the one under consideration in this case is undertaken by a city, a financial situation similar to the subdivision development is likely to be presented. The city faces the same items of expense and the same increase in land value. But under ordinary methods of financing improvements, the parallel ends there. In most cases, the general taxpayers pay the entire cost of the improvement subject to such reimbursement, seldom as much as fifty per cent of the construction costs, as the city can obtain by assessment. The increased value of the abutting lands goes to the owners without effort on their part.

Where the expense is heavy and the increase in value great, it would seem to be an imposition on the general taxpayers to proceed on the old basis. Excess condemnation enables the city to treat the improvement and any part of the abutting property as one real estate problem to be handled to the best advantage for the taxpayers.

When a proper case for the application of excess condemnation arises, it is sound financial sense and sound financial morality to make use of it. The purpose is clearly the public benefit.

C. Analysis of the Meaning of Due Process of Law in These Cases

Plaintiffs object to the excess appropriation attempted in these cases by the city on the ground that it deprives them of their property without due process of law. It is to be remembered that the city proposes to compensate them in full for the present value of their properties as they stand. Furthermore, it is clear that none of these properties is a homestead or anything more than a speculative real estate investment. What these property owners therefore desire to preserve is not their property but the hope of an increased value in dollars and cents to come to their property after the improvement is made. This is the sacred property right for which the Fourteenth Amendment is invoked.

Any law expressing a new idea in government, no matter how general its terms nor how uniform its operation, must expect to run the gauntlet of an attack under the Fourteenth Amendment, if, in a particular situation, the upsetting of the law would work to the private advantage of some individual or group.

Among new ideas in government which private parties have attempted to defeat in the courts by resort to the Fourteenth Amendment, at least six stand out prominently to prove that that amendment was not intended to suppress progress, to-wit:

1. The right of states to limit trial by jury. *Walker* v. *Sauvinet*, 92 U. S. 90.
2. The assessment of benefited real estate to pay part of the expense of a public improvement. *Davidson* v. *New Orleans*, 96 U. S. 97.
3. Indictment by information instead of by grand jury. *Hurtado* v. *California*, 110 U. S. 516.
4. The establishment of swamp land reclamation districts on an assessment basis. *Hagar* v. *Reclamation District*, 111 U. S. 701.

5. The establishment of irrigation districts on an assessment basis. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112.
6. Zoning laws. *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.

The underlying idea of "due process of law" is fairly simple. To meet its requirements, a statute affecting the pursuits or property of individuals needs only the following:

1. *It must be law.* As said in *Hurtado* v. *California, supra,* at page 535:

> "Law is something more than mere will exercised as an act of power. It must be not a special rule for a particular person in a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial."

2. *In its dealings with the individual, the statute must provide process.* Referring again to the quotation from the Hurtado case, it must provide for a hearing "before condemning," it must proceed "upon inquiry" and it must render "judgment only after trial."

3. *The process must be due process.* There must be the usual and reasonable provisions as to notice, time and place of trial, etc.

1. There is Due Process

Counsel believe that the provision of the constitution of Ohio under attack in these cases meets every requirement of "due process of law." The second and third requirements have certainly been met in the process taken by the city. The provisions of the Ohio statutes for the condemnation of land are found in Ohio General Code, Secs. 3677, 3679, 3680, 3681, 3682, and 3691.

The procedure followed under these statutes is as follows:

1. The city council passes a resolution declaring its intention of appropriating the property, describing the land to be taken. (G. C. 3679.)

2. A copy of this resolution is served upon all property owners involved, by personal service if they are residents, by legal publication if they are non-residents. (G. C. 3680.)

3. After service is complete the city council passes an ordinance appropriating the property and again describing the land to be taken. The city solicitor is directed to apply to a court of competent jurisdiction to empanel a jury to determine the value of the land appropriated. This ordinance is published according to law. (G. C. 3680.)

4. The city solicitor files a petition in the Common Pleas Court describing the land by metes and bounds and praying that the value may be assessed by a jury. Service is had upon the defendant (the property owner) as in all civil suits under the Ohio law. (G. C. 3681, 3682.)

5. A jury is empaneled according to law; both the city and the property owner present their evidence of value and the jury brings in a verdict which is their finding as to value. (G. C. 3683.)

6. The property owner may file a motion for new trial. If this is overruled a judgment is rendered against the city in the amount of the verdict.

7. The city gets title to the land only after payment to the owner of the compensation assessed. (G. C. 3691.)

8. After judgment the property owner may take his case to the Court of Appeals on error and to the Supreme Court on motion to certify. (G. C. 3695.) The city may within six months of the judgment pay the judgment with interest and enter into possession, or it may refuse to take the land, in which case the city must pay the costs and expenses incurred by the property owner. (G. C. 3697.)

This procedure the city followed in the cases at bar up to the point where it was enjoined by the District Court. We submit that so far as process is concerned there can be no question as to the full and ample protection of the land owner. He has due notice of every step the city takes; he has his day in court; a jury assesses the amount of compensation he is to receive; he may appeal from its verdict; he must be paid that sum before the city can take his land.

2. Complainant's Objection must be that the Ohio Constitution, Art. XVIII, Sec. 10, is not within the Category of "Law"

It being clear that the proceedings in excess condemnation cases provide for "process" and that the process is "due process," it would seem that plaintiffs rest their contentions on some claim that Section 10, of Article XVIII of the Ohio Constitution is not "law"; in other words, that in adopting the said section the people of Ohio authorized an arbitrary act of confiscation unreasonable in its purpose and in the means provided for the accomplishment of that purpose. We submit that this provision of the Ohio constitution is not the product of the arbitrary whim of a despot; it is the reasoned expression of law adopted by a constitutional convention of the elected representatives of the people of Ohio and approved by the votes of the people of Ohio. Furthermore, it is in harmony with reasoned constitutional provisions and statutes of other states and other nations. Finally, in its procedure, it is applied with exactly the same "due process" used in ordinary cases of appropriation of property.

As well said in the Hurtado case, supra, at page 537:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legis-

> lative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

As has been pointed out by the decisions, "due process of law" is the practical equivalent of the old phrase "according to the law of the land." When plaintiffs object to the action of the city of Cincinnati in taking their property by excess condemnation, they say that such a taking is not "according to the law of the land." The constitution of a particular state being the highest expression of the "law of the land" for that state, it seems almost a contradiction in terms to say that the highest law of the state is not the law of the land.

It is conceivable that in some time of stress and bitter feeling, the people of a state might declare as part of their constitution some piece of atrocity aimed at particular individual members or groups of the community and that a court would have to hold that such a provision could not be law even when solemnly adopted by vote of the electors. And this would be true even were there no Fourteenth Amendment or any constitutional provision whatever. It would be true in England with no constitution so long as English courts recognized the fundamental principles of liberty and a government of freemen.

But no such situation exists here. Excess condemnation laws are not aimed at individuals. They are laws in the highest sense, in that they are remedial legislation intended for the general welfare, having general application, and carried into effect in accordance with general procedure.

The city of Cincinnati in these cases has no personal motive. It is not seeking to punish the owners of property on East Fifth Street, neither is it proposing to turn their property over to some favorite of the government. It has a mixed problem of city planning and city finance on its hands and it is proposing to work out this problem on a basis that will be fair to the property owners and to the general taxpayers of the city.

The citizens of Ohio have done everything they could to make excess condemnation the law of the land in their state. If what they have done is not sufficient, then excess condemnation is forever prohibited to them. And what applies to excess condemnation must, if we are to be logical, apply to every new governmental principle evolved in the fullness of time to meet some new situation. The answer in every case, as in this case, will be, "Our fathers have not done so."

This Court has said in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110:

> "In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

3. Due Process of Law is not Synonymous with Public Use

Our opponents claim that the purpose of this condemnation is a private one and therefore violates the Fourteenth Amendment. They claim that it amounts to taking the property of A and giving it to B. If this were the true state of fact then the Fourteenth Amendment need not be invoked, for such a legislative act would be void as beyond the power of government, irrespective of constitutional limitations. But the facts are not as claimed. The city here takes A's land only after a judicial determination of value and after A is fully compensated for every element of value taken from him. Nor in this case is the land given to B. Upon the record, the city may never part with the land. It may keep it. But if it does sell the land, under the Ohio law it can do so only upon public advertisement and sale to the highest bidder. (Ohio Gen. Code, Secs. 3698, 3699.) The act of the city, therefore, is not an act of confiscation transcending the powers of government.

Where then is the Fourteenth Amendment involved?

In this connection we wish to point out the significant difference between the Fifth Amendment, applying to the federal government, and the Fourteenth Amendment, applying to the states.

The Fifth Amendment reads:

> "nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment reads:

> "nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

In the latter no mention is made of taking private property for public use and the fact that the framers of the Fourteenth Amendment had before them the Fifth Amendment would indicate that the omission was deliberate and that there was no intention to confer on the federal government jurisdiction to interfere with the exercise of the power of eminent domain by the states.

We meet the federal question, therefore, not within the field of public use as used in the Fifth Amendment but under the due process clause of the Fourteenth Amendment.

The case stands before this Court exactly as though there were no such term as "public use," either in the state or federal constitution. The only question here raised is due process.

There is no limitation in the federal constitution limiting the exercise of the power of eminent domain by the states to cases of public use. Eminent domain, like the police power and the power of taxation, is an attribute of the sovereignty of a state, and like all other sovereign powers it must be exercised by the state for the public good or public benefit. Like other powers, the exercise of eminent domain may be limited by a state constitution; in fact many states limit the power of eminent domain to cases of public use and give a very restricted meaning to public use. But a state may, if it wishes, make no constitutional limitation upon the power, or it may specifically provide in its constitution that the power may be exercised for a certain purpose. This is exactly what the state of Ohio has done, when by its constitution it provided that the power of eminent domain could be exercised in the manner known as excess condemnation.

In discussing the validity of this provision we must consider whether or not the Court must say that the state in its constitutional exercise of its sovereign power of eminent domain is acting in an arbitrary or unreasonable manner. Specifically, in the case at bar, the state has declared that a use of eminent domain for purposes of excess condemnation is an exercise of sovereign power for the public good or benefit. Must the Court find that in so doing the state has acted in an arbitrary or unreasonable manner?

This, we submit, is only another way of saying that under the Fourteenth Amendment the state constitution must not be an arbitrary whim not within the category of "law."

The Supreme Court has never made due process synonymous with public use. To do so would be in effect to make the Fifth Amendment applicable to the states.

We are aware of the language of this Court in certain cases where it is said that the Court considers public use under the Fourteenth Amendment. But every such case is one in which the distinction here made was of no importance. In each case the state constitution limited eminent domain to public use, and the state legislature enacted a law under that constitutional limitation providing for an exercise of eminent domain. No case has come before this Court where a state constitution was attacked as violating the Fourteenth Amendment because of the adoption of a particular limitation upon the power of eminent domain.

Furthermore, in every case in which the Supreme Court has considered under the Fourteenth Amendment the validity of a state statute providing for eminent domain, it has concerned itself with an examination of the arbitrary character of the legislation. It has sustained the legislation unless it was unable to find a rational basis for the public character claimed for the statute. The cases discussed in this brief will illustrate this point.

If, then, the question of public use is to be discussed in this case it must be in the sense that the constitution of Ohio in Art. XVIII, Sec. 10, has sought by eminent domain to accomplish an arbitrary act of confiscation not reasonably related to any public purpose or benefit and beyond the inherent power of the people of Ohio in exercising their sovereignty.

The plaintiffs, however, press their argument beyond this view of public use. They claim that the taking must be not merely for a public purpose but that the *property taken must be actually occupied by the improvement.*

Such a claim reduced to its simplest terms says that unless the public actually possesses and uses the land taken, the taking has been without due process of law. In other words, due process means public occupancy. A rule of thumb of this sort would be very convenient, no doubt, but this Court has in numerous cases expressly refused to adopt such a rule, and it has done so for the reason that it has always considered as the vital question, the reasonable or arbitrary character of the law under examination.

As was said in *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Power Co.*, 240 U. S. 30, 32:

> "The inadequacy of use by the general public as a universal test is established."
>
> See also:
> *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9;
> *Fallbrook Irrigation Co.* v. *Bradley*, 164 U. S. 112;
> *Clark* v. *Nash*, 198 U. S. 361;
> *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527;
> *Hairston* v. *Railway*, 208 U. S. 598.

In *Block* v. *Hirsch*, 256 U. S. 135, this Court, after citing the Clark case and the Strickley case, said, p. 155:

> "They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest . . . and that the public interest may extend to the use of land."

The approach of this Court to a question of the validity of a statutory declaration as to a particular public use is clearly based upon the reasonable character of the purpose the state seeks to accomplish and of the means adopted to attain that purpose.

Of course the Court will not substitute its judgment for that of the people of a state. As was held in *Clark* v. *Nash*, 198 U. S. 361, 369:

> "This Court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject and we have said that the people of a state, as also its courts, must in the nature of things be more familiar with such facts and with the

> necessity and occasion for the irrigation of land than can anyone be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weights with the state court."

Old Dominion Land Co. v. *U. S.*, 269 U. S. 53, 66.

> "Congress has declared the purpose to be a public use, by implication if not by express words . . . Its decision is entitled to deference until it is shown to involve an impossibility."

In this connection we wish to point out that we are dealing with the constitution of the state of Ohio adopted directly by the people of the state. As such it is the most basic declaration of law of which the people of Ohio are capable. While it is true that not even the people of a state may violate the constitution of the United States, it is equally true that under the well known decisions of this Court a state constitution should not be declared void unless an imperative case of unconstitutionality arises. If the acts of a state legislature or of Congress or the decisions of a state court are "entitled to deference until they are shown to involve an impossibility," we submit that the constitution of Ohio is entitled to even greater deference and weight and that unless clearly and unmistakably arbitrary and confiscatory should be upheld by this Court.

D. Excess Condemnation is Directed to a Public Good and is an Entirely Reasonable Method of Exercising the Power of Eminent Domain

By way of introduction to this point of our argument, we wish to quote Mr. Justice Brewer's comment in *Muller* v. *Oregon*, 208 U. S. 412, 419-421:

> "In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may

not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

1. Widespread Legislation Providing for Excess Condemnation Indicates that it is Considered a Reasonable Method

The fact that the people of eight states have provided in their constitutions for excess condemnation is in itself an indication that they considered that there was a need for such a power.

In addition to the constitutional provisions already noted the following states have at various times enacted statutes providing for excess condemnation:

Connecticut.	Spec. Laws 1907, p. 43, for Hartford.
	Spec. Laws 1913, p. 243, for New Haven.
Illinois.	Laws, 1927, p. 227, for Chicago.
Maryland.	Laws 1906, ch. 108, for Baltimore.
	Laws 1908, ch. 166, for Baltimore.
Massachusetts.	Laws 1912, ch. 186, for Worcester, Belmont St.
	Laws 1913, ch. 201, for Worcester.
	Laws 1913, ch. 326, for Worcester, Washington St.
	Laws 1913, ch. 703, for Salem, Bridge St.
	Laws 1913, ch. 778, for Swampscott, Humphrey St.
New Jersey.	Laws 1870, ch. 117, for Newark.
New York.	Laws 1911, ch. 776, for New York City wharves and terminals.
	Laws 1914, ch. 300, for Syracuse.
	Laws 1915, ch. 593, for New York City, general improvements.
	Laws 1920, ch. 431, for Rochester.
	Laws 1920, ch. 439, for Buffalo.
	Laws 1923, ch. 665, for Jamestown.
	Laws 1923, ch. 170, for Niagara Falls, widening Main St.
	Laws 1926, ch. 556, for Yonkers.
	Laws 1928, ch. 545, for Poughkeepsie.
	Laws 1929, ch. 538, for Erie County.
Ohio.	97 Ohio Laws 334. General act for municipal parks, buildings, etc.
Oregon.	General Laws, Secs. 3837 to 3844. General act for cities.

Pennsylvania.	1907, No. 315. General act for municipal parks, parkways and playgrounds.
Virginia.	Laws 1906, ch. 194. General act for cities. Laws 1916, ch. 71. Enlarging powers of above.
Wisconsin.	Laws 1909, ch. 162. General act for municipal parks, etc. Laws 1911, ch. 486. General act for converting city streets into parkways.

The British Parliament in 1845 passed the Land Clauses Consolidation Act (8 and 9 Vict., ch. 18), and thereafter numerous special acts each providing for excess condemnation: London County Council Act (Holborn-Strand Improvement) 1899, 62 and 63 Vict., ch. CCLXVI, Sec. 33; London County Council Act 1901, 1 Ed. 7, CCLXXI, Sec. 52; Mall Approach Act, Parliamentary Papers, 1914, Vol. VIII, Bill 259. France in 1852 enacted such a law. (Decree of March 26 1852; Duvergier, Collection des Lois, Vol. LII, p. 282.) This was modified in some particulars in 1912. (Law of April 10, 1912, Collection Complete des Lois, etc. (new series, Vol. XII). Belgium passed an excess condemnation statute in 1867 (1904 Mass. House Doc. 1096).

The Lex Adickes, passed by the Prussian Landtag in 1902 (Gesetz-Sammlung fuer die Koeniglichen Preussichen Staaten, 1902, Nos. 10386, 10387), is the first German application of an interesting phase of excess condemnation. There are also numerous special acts relating to particular German cities (Kissen, B. W. Report on Town Planning Enactments in Germany, 65-108). The charter of the city of Montreal, 1913, No. 421, gives the power of excess condemnation to the city and the law of Ontario grants the power to the city of Toronto (Stat. Ontario, ch. 119, No. 12).

A fairly complete examination of the subject of excess condemnation shows that California, Massachusetts, Michigan, New York, Ohio, Rhode Island, Virginia and Wisconsin have provided for that power in their state constitutions. Eleven states have passed statutes of a general or special nature. Of common-law jurisdictions other than the United States, the British Parliament, the Parliament of Ontario, the Charter of Montreal have provided for excess condemnation. Of civil law jurisdictions, France, Belgium and Germany have similar enactments. We submit that in view of this widespread legislative declaration both by constitution and statute, it is difficult to say that the purpose of all these enactments, distributed over a long period of time and a wide area, is arbitrary and violates due process of law.

With reference to the foreign examples of excess condemnation we wish to point out that, contrary to the idea of the Court of Appeals (Rec., p. 108), they are not cited as constitutional enactments in the American sense of the term "constitutional." They are presented that the Court may see that in many countries of the world governments have recognized a public problem involved in building, widening and improving public streets, and that they have regarded excess condemnation as a reasonable solution of that problem. When we are discussing the arbitrary character of a particular law providing for eminent domain it is certainly persuasive, to say the least, to find that other modern governments recognize such a law as a reasonable exercise of sovereignty. In fact the British examples are in point from a constitutional view. There has always been a "law of the land" in England. That is the source of our phrase "due process of law." We submit that it would be surprising to learn that England since 1845 had been acting contrary to the law of the land in its numerous applications of excess condemnation.

2. *The Actual Use of Excess Condemnation Indicates that it has been Considered a Reasonable Practice*

The actual use of the powers granted by these laws further indicates that excess condemnation has generally been regarded as a reasonable application of eminent domain. The city of New York has used its powers many times. Mr. Herbert S. Swan[1] reported to the Committee on Taxation of the city of New York in 1915 (p. 54) that the city had used the power in opening the following streets: Third, Fourth, Sixth, Thirteenth and Fourteenth, Seventh Avenue, Cedar Street, Lewis Street, Exchange Place and Lafayette Place. The area of excess lands varied from 9 to 71,480 square feet. All of these cases, however, were very early ones. A recent example is the extension of Sixth Avenue to provide an approach to the Hudson River vehicular tunnel.

The city of Rochester, N. Y., has made at least four street improvements by using excess condemnation.[2] Fig. 1 (page 27) shows the Devonshire Court Extension. Prior to improvement, Devonshire Court, Turner Street, Chili Terrace and Salina Street were dead-end streets in a moderately priced residential section. The property owner demanded an exorbitant price and proposed to subdivide in a manner not conforming to the City Plan. In 1921 Devonshire Court was extended to the east opening up the four dead-end streets and connecting them with Thurston Road. At the same time the adjacent land as indicated was taken by excess appropriation and was subdivided by the city. These lots have been sold by the city with the following result. The total cost of land was $17,224. Receipts from sales

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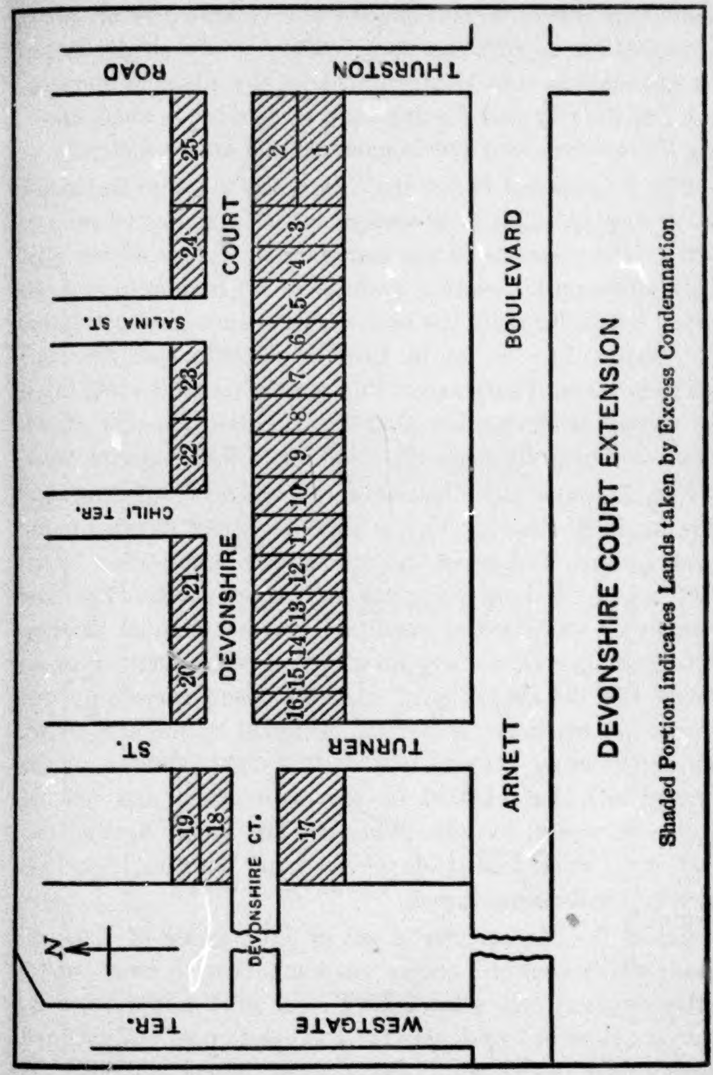
[1] Excess Condemnation. A report of the Committee on Taxation of the city of New York, New York. 1915.

[2] For the Rochester cases here noted, see The Use of Excess Condemnation in the Opening, Widening and Extension of Streets, a paper read by A. L. Vedder before the City Planning Division of the American Society of Civil Engineers at New York City, January 22, 1925, published by the A. S. C. E. in 1925. Also reported in The American City, February, 1925, pp. 125-127.


THURSTON ROAD
SALINA ST.
CHILI TER.
TURNER ST.
WESTGATE TER.
DEVONSHIRE COURT
DEVONSHIRE CT.
ARNETT BOULEVARD
N
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DEVONSHIRE COURT EXTENSION

Shaded Portion indicates Lands taken by Excess Condemnation

Fig. 1

amounted to $16,750 and the city still retains one lot valued at $2,000.00. In addition the property is now subdivided in an economical way conformable to the planned development of the city and the dead-end streets are opened, allowing a free economic development of the entire district.

Fig. 2 (page 29) shows the University Avenue Extension in Rochester. This is a case of street opening to connect two existing streets in the commercial section of the city. This offers an interesting example of lot remnants in a few cases, but in the main the plan accomplishes a consolidation of existing lots so as to furnish suitable and economic building sites. There are in this plan at least five lots taken by excess condemnation that do not abut the new street. There are only six cases that could be called remnant cases.

Fig. 3 (page 30) illustrates the widening of Elmwood Avenue in Rochester. This is almost a direct parallel to the cases at bar. The street was widened from 49½ feet to 100 feet, all of the land being taken from one side. The land remaining was deemed unsuitable for economical building sites and therefore every abutting lot was taken in its entirety. In the majority of cases the land remaining was larger in area than the portion occupied by the new street. On intersecting streets lots were taken (similar to the Vester lot) that abutted on the cross-street and did not touch Elmwood Avenue. Thus on Mt. Hope Avenue two such lots were taken; on Cedarwood Terrace, four; on Southview Avenue, three.

Under the Massachusetts act of 1904 (Acts of 1904, ch. 443), which confined excess condemnation to cases where "the remnant left after taking such part would from its size or shape be unsuitable for the erection of suitable and appropriate buildings," the Fulton Street widening in Springfield of 1914 is the most interesting example.* The

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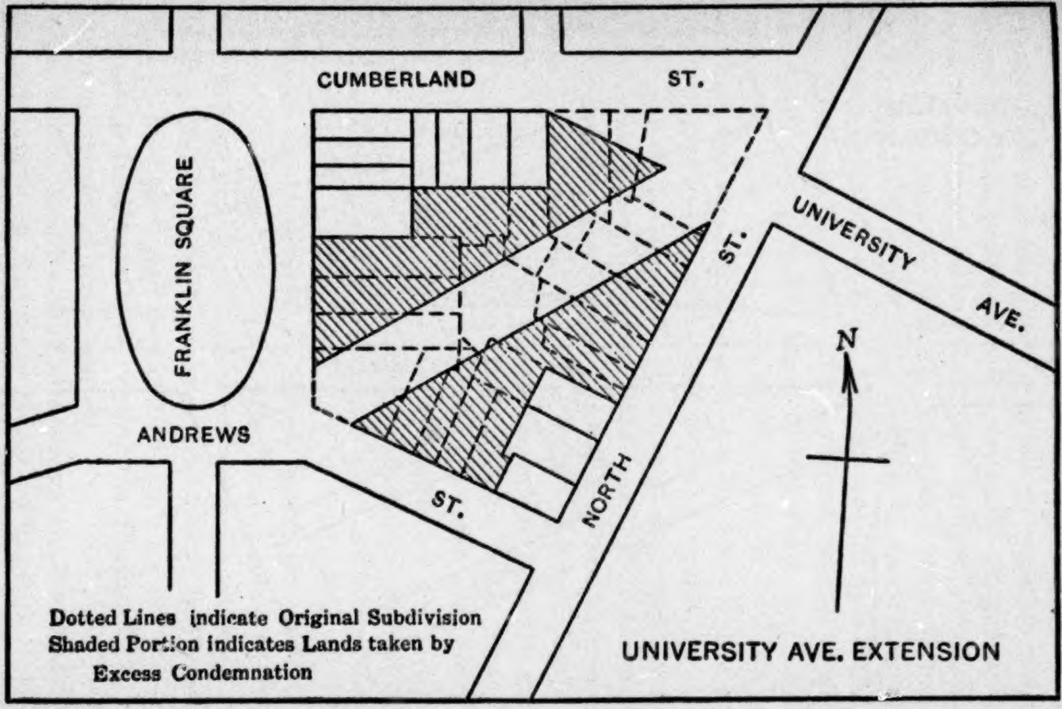
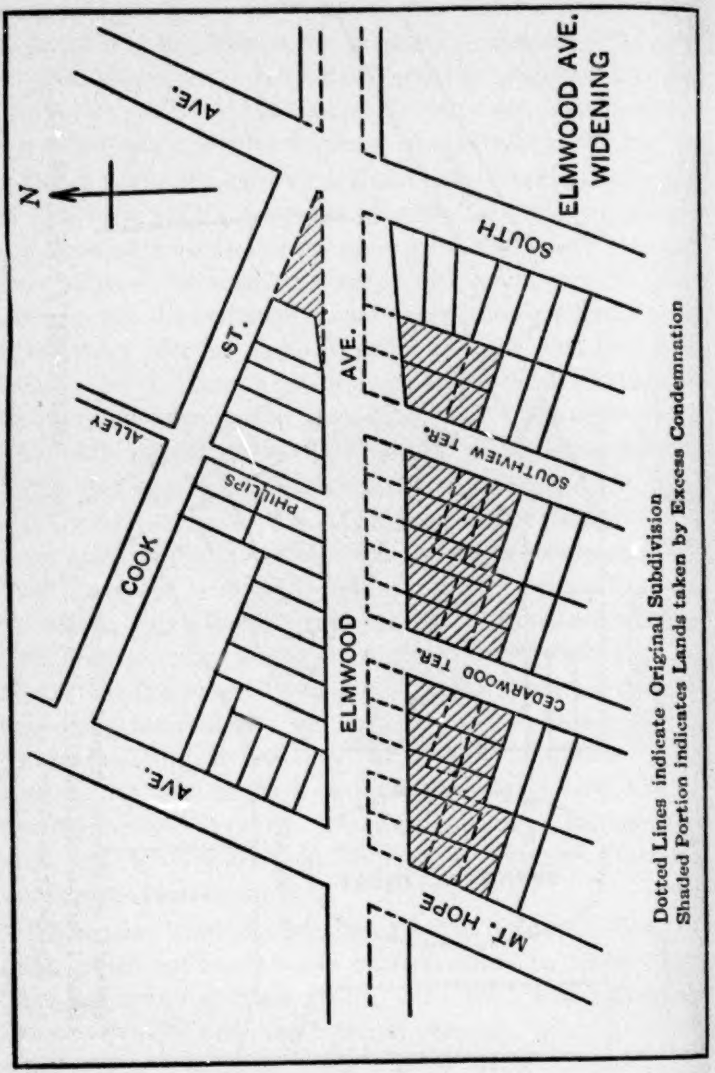
* See Cushman, Excess Condemnation, pp. 65-66.


CUMBERLAND
ST.
FRANKLIN SQUARE
ANDREWS
ST.
NORTH
ST.
UNIVERSITY
AVE.
N
UNIVERSITY AVE. EXTENSION

Dotted Lines indicate Original Subdivision
Shaded Portion indicates Lands taken by
Excess Condemnation

FIG. 2


N
COOK
ST.
AVE.
AVE.
ALLEY
PHILLIPS
ELMWOOD
AVE.
SOUTH
SOUTHVIEW TER.
CEDARWOOD TER.
MT. HOPE

ELMWOOD AVE. WIDENING

Dotted Lines indicate Original Subdivision
Shaded Portion indicates Lands taken by Excess Condemnation

FIG. 3

street was widened for five blocks from thirty-three to seventy-five feet on one side. Six excess parcels were taken by appropriation proceedings, the size of the parcels being as follows: Minard, 44 foot front, 21 foot depth, area 1,062 square feet; Conn. River R. R. Co., 41 foot front, 27 foot depth, area 1,112 square feet; Barrett, 41 foot front, 27 foot depth, area 1,134; King, 38 foot front, 22 foot depth, area 875 square feet; Dam, 106 foot front, 59 foot depth, area 6,334; Albert, 80 foot front, 25 foot depth, area 1,852 square feet. The size of some of these parcels would indicate that the Massachusetts courts were quite liberal in their construction as to what constituted a remnant.

The city of London has applied excess condemnation to a very great extent.[1] Between 1855 and 1913 it executed one hundred and three street proceedings in which excess property was appropriated. The Northumberland Avenue Improvement was one of these. The greatest project was the Kingsway Improvement from Holborn to the Strand. (Fig. 4, pages 33 and 34.) The total area taken was twenty-eight acres, of which twelve and one-quarter acres were actually occupied by the street and fifteen and three-quarters acres were taken as excess and used for building sites.

French experience centers largely around the development of boulevards by Baron Haussmann between 1852 and 1869. In that period excess condemnation was used in building fifty-six miles of streets. The Avenue de l'Opera was also built by this method in 1876.

Brussels and Liege have applied the Belgian Law in numerous municipal improvements.[2]

The city of Montreal has used excess condemnation in the extension of St. Lawrence Boulevard in which it condemned 102,002 square feet of which 52,744 square feet represented surplus property. In the Cartier Street opening 75,180 square feet of surplus land were appropriated. For Cartier Square 82,078 square feet of surplus were taken. The improvement of St. Joseph Boulevard involved the condemnation of 556,100 square feet surplus.[1]

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[1] See Report to Committee on Taxation, opp. cit. p. 28-33.

[2] See Mass. House Doc. 1906 (1904).

We have sought to demonstrate that many governments have provided by law for excess condemnation and that in making public street improvements the method has been in use for some time both in this country and abroad. This, we submit, argues strongly that excess condemnation has become a part of the reasoned legislative expression of many states relative to their exercise of the power of eminent domain and that in meeting practical improvement problems excess condemnation has been considered and used as a solution. We come now to an analysis of the questions presented to the authorities when a street is to be widened or opened and the relation that excess condemnation bears to those problems.

3. Reasons for the Use of Excess Condemnation

For many years the inadequacy of the ordinary powers of eminent domain has been generally recognized by students of the subject.[2] Fifteen years ago a committee on taxation made a report to the mayor of New York City upon the use of the excess condemnation powers granted by the New York Constitution and a statute passed pursuant thereto. This Committee, Alfred E. Marting, Chairman, reported on May 20, 1915, as follows:[3]

> "*Control of Land Adjacent to Improvements.* American cities have been hampered in effective city plan development and in creating dignified and artistic public places by the free and unrestricted use of abutting property by private owners. Many of our finest squares

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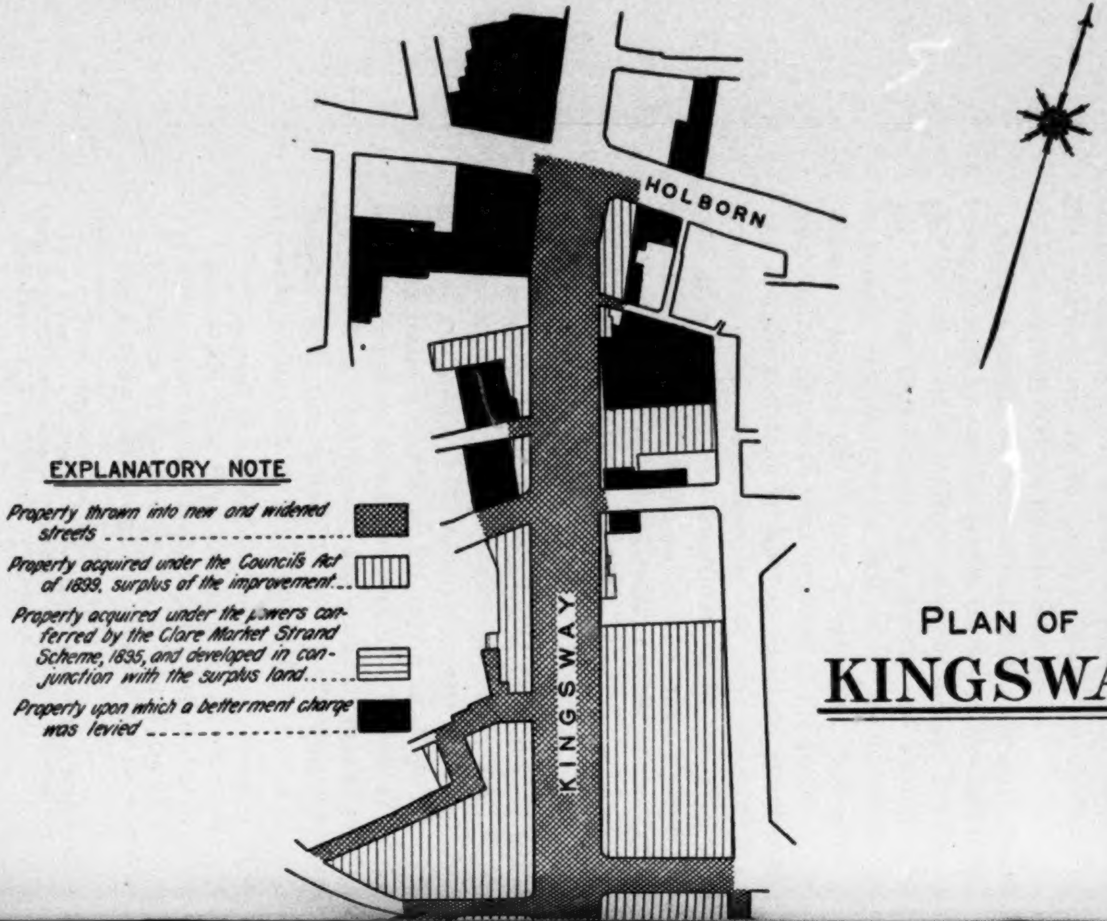
[1] See Cushman, opp. cit. p. 143-145.

[2] For a complete discussion of the subject matter here summarized, see Chapters II, III, IV of Excess Condemnation, Robert E. Cushman.

[3] See Report of The Committee on Taxation, opp. cit.


HOLBORN
KINGSWAY
EXPLANATORY NOTE
Property thrown into new and widened streets
Property acquired under the Council's Act of 1899, surplus of the improvement
Property acquired under the powers conferred by the Clare Market Strand Scheme, 1895, and developed in conjunction with the surplus land
Property upon which a betterment charge was levied

PLAN OF KINGSWAY

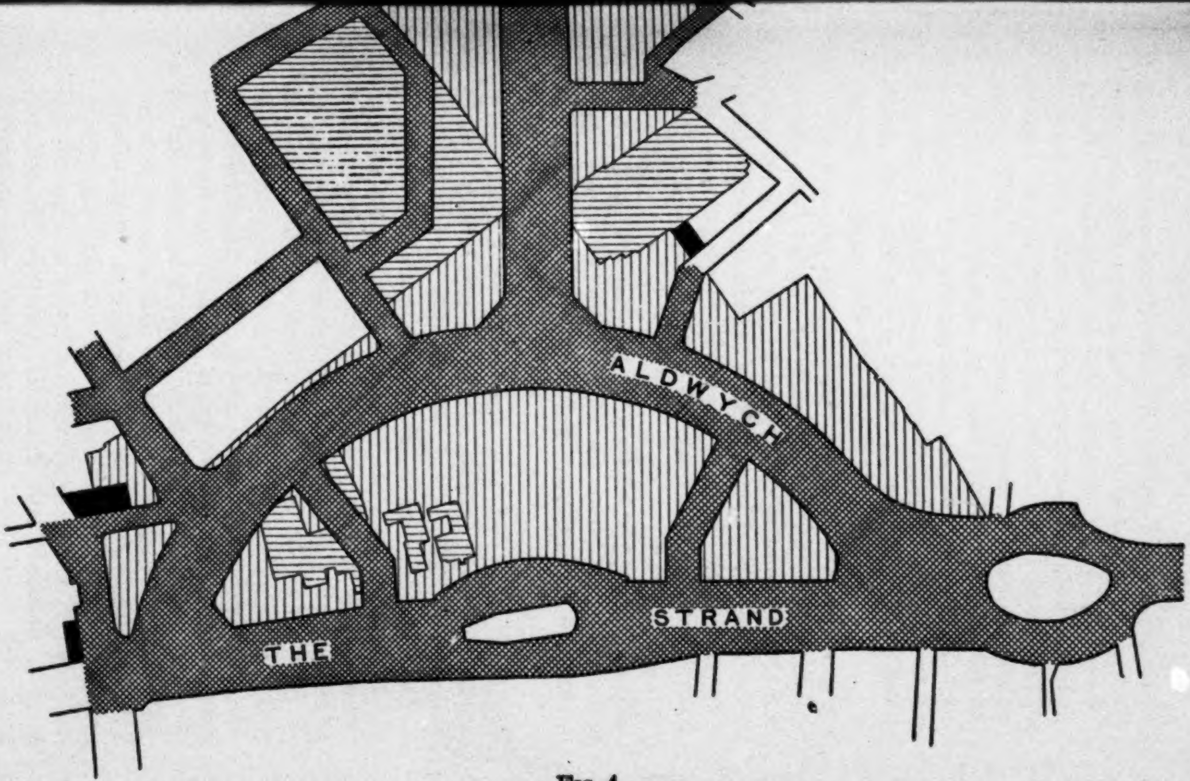

ALDWYCH
THE
STRAND

Fig. 4

and parkways are lined with stables, billboards, shops, factories, gas tanks, saloons. There is no orderly architectural arrangement. One and two-story buildings adjoin twelve and twenty-story structures. Residences, shops, stores, factories crowd one another close. This condition has decreased property values and the attractiveness of public places. It is to the advantage of the private owner as well as to that of the city that neighborhoods should not be allowed to run down, that our public places be surrounded by buildings in keeping with the improvement.

The city should have the power to sell or lease the excess land subject to suitable restrictions. If this is done, New York will be enabled to develop streets and public places comparable to those of Paris and Vienna. The convenience and enjoyment of the community should take precedence of the whim of the private owner.

We have but to look at our bridge approaches, our small parks, our public squares and places to realize that successful city planning requires the control of adjacent property.

Re-Plotting of Remnants and Irregular Building Plots. New York furnishes several 'horrible examples' in cutting new streets through sections already built up without excess condemnation. Delancey Street in Manhattan and Flatbush Avenue Extension in Brooklyn have both been held back in development and in the increased value which the improvement promised, by the small, irregular, odd-shaped building plots which were left. These are in many cases unsuited to proper building unless united with adjoining properties held by other owners. The public loses in tax value and sightliness and the private owner is injured because his lot is not available for suitable development. A glance at the maps accompanying this report, showing the lot lines after these streets were cut through, is proof conclusive of loss and waste under the old system. Although the Flatbush Avenue Extension has been practically completed for three years and despite its strategic position, development has not begun. The street still looks, to borrow an expression of Lawson Purdy's, 'as if it had been devastated by an earthquake.' European nations long ago met this situation and have empowered local governments to relocate and replot such areas. Excess condemnation would leave the city free to rearrange and subdivide the land fronting the improvement into plots of the size and shape best suited to the proposed development.

Saving of Expense to the City Through Sale of Abutting Property at Increased Values Due to the Improvements. While the necessity for excess condemnation rests mainly upon the control of adjacent land and the replotting of remnants, a substantial saving of dollars and cents will result in many instances. It must not be assumed that excess condemnation will in every case bring revenue to the city or reduce the cost of public improvement. Sometimes excess condemnation is justified for social purposes alone, but often financial gain to the city will also result. It is equitable that the increased value which arises solely from the enterprise of the community in constructing a boulevard or a park or public square should go to the city and not to those who are fortunate enough to own property in the path of the improvement. If the cost of public improvements is reduced the city will be better able to continue its efforts for a rational and convenient city plan without too great a financial burden.

We can learn much from Livingston Street, in Brooklyn. In 1905 this street was widened from 50 to 80 feet by taking 30 feet from the southerly side. Livingston Street runs parallel to Fulton Street, and the purpose was to relieve the overcrowded condition of Fulton Street. The land to a depth of 100 feet on the southerly side of Livingston Street, together with the improvements, was assessed at $1,268,700. The awards made for taking 30 feet from the front amounted to $1,989,890, or about 57 per cent in excess of the as-

> sessed valuation of the entire property. In many instances the buildings were easily adapted to the new conditions, new fronts were built, and as a result of the improvement the rental and fee value was largely increased. In 1911, six years after the widening, the assessed valuation of the remaining land, though but 70 feet in depth, had increased 219 per cent over the assessed valuation of the land 100 feet in depth in 1905. One-quarter of the cost of the widening of the street was at first assessed upon the local property owners. The area of assessment was so large that a considerable portion of the cost was to be paid by owners of property not directly benefited. But through an act of the legislature the assessment was canceled and the cost of the entire proceeding was paid by the city by the issuance of bonds.
>
> Where the city is compelled to take a considerable portion of a lot or building it has to pay practically the cost of the entire parcel and would do better to acquire the fee of the whole plot and secure the benefit from the increased value of the remainder.
>
> The experience of London in financing street improvements by excess condemnation should be a valuable help to us. From 1889 to 1913 the London County Council used excess condemnation in forty-five street proceedings, the gross cost of which was $44,246,125.
>
> Without excess condemnation extensive replanning and reconstruction in the older parts of London could not have been carried out. While revenue is not the principal reason for excess condemnation it is a strong incidental consideration."

In 1904 a Committee of the Massachusetts Legislature reported on Excess Condemnation as follows:*

> "The Committee presents the following conclusions:
>
> It has clearly appeared, from the evidence submitted to us, that the present system of laying out new streets or widening or altering existing ones, under which

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* Massachusetts House Doc. 1904, No. 288, p. 4-6.

only the land actually required for the street is taken, is, especially in those parts of cities which are covered with existing buildings, productive of serious public disadvantages; and a brief consideration of the matter is sufficient to show that this difficulty is inherent in the system itself, and must persist unless some modification of that system can be devised.

The land abutting on any existing street is divided and arranged in lots, which, as well as the circumstances have admitted, are adapted to the street in its present condition, and the buildings thereon are constructed in conformity therewith. Any widening of the street not only destroys the existing buildings, but, by reducing the size of the abutting lots, leaves the residues or remnants of many of them of such shape and size as to be entirely unsuited for the erection of proper buildings, unless and until these remnants have been united with the adjoining properties, generally with those in the rear, which are thus enabled to extend out to the new street lines.

The same condition is found, and frequently even to a greater extent, when a new thoroughfare is laid out through existing blocks covered with buildings.

Hence, when an existing street is widened or a new thoroughfare is laid out under the present system, the lots on one or both sides of the new or widened street are left in such condition that, until a rearrangement can be made, no suitable buildings can be erected thereon, and the public benefit to be derived from the improvement is in great measure lost.

The street may be valuable as a thoroughfare or as one for through traffic, but not for either business or residence purposes; and striking instances of this have been presented to the committee in connection with street improvements in the city of Boston.

Not only is such a situation a great disadvantage to the city, in hindering and sometimes preventing its proper development, but it will easily be seen that this state of affairs renders the collection of betterment assessments extremely difficult, since the benefit to the surrounding property which should accrue from the improvement is actually not received until these residues or remnants have been united with the adjoining lots,—a process which, under the present system, may take years.

It often happens that the owners of these remnants, desirous of deriving some income therefrom in the meanwhile, erect thereon temporary structures, unsuited for proper habitation or occupancy; and such structures are too frequently made intentionally objectionable, both in appearance and in the character of their occupancy, for the purpose of compelling the purchase of such remnants at exorbitant prices; with the result that a new thoroughfare, which should be an ornament to the city, is frequently for a long period after its construction disfigured by unsightly and unwholesome structures, to the positive detriment of the public interests. These results, which seem inevitable under the present system, may operate to prevent the undertaking of much-needed street improvements. These matters are forcibly presented in the testimony of Mr. Charles, chairman of the Board of Street Commissioners of Boston, and of his associate commissioners Mr. Duane and Mr. Gallivan, to which testimony especial attention is directed.

Furthermore, it is believed that the taking of whole estates, instead of taking the greater part and leaving an undesirable remnant, would not materially increase the initial expense of the undertaking; inasmuch as a city which takes, under the present system, so much of an estate as to leave the remainder unsuited for building purposes, is often obliged to pay for the value of the part taken, and for the damages to the remaining part practically as much as it would be obliged to pay for the whole estate.

What has been said above indicates the public considerations which render a change in the existing system desirable.

There is also, however, another side to the question, viz., that of the private owner, the consideration of which appears to point to the same conclusion. It frequently happens that an owner, the greater part of whose estate is necessarily taken for a public work, would prefer not to be left with the remnant on his hands, and, if an opportunity were offered, would voluntarily request the city to take the whole estate. Many people recognize that there is less opportunity for differences of opinion upon the question of the market value of a whole estate than over the more complicated question of the value of the portion which has been taken, and the damages to the remainder by reason of such taking; and hence a system under which the city could acquire the whole estate would be productive of greater ease in the settlement of damages, and less likelihood of litigation over the question involved therein.

This right of the private owner to require the taking of the whole estate, when the residue, after deducting what is actually needed for the public work, is unsuited for the erection of appropriate buildings or is reduced below a certain area, is almost universally recognized both in England and on the continent of Europe. It has also received recognition in this state, in chapter 159 in the Acts of 1867, relating to the widening of Oliver Street in the city of Boston, which act, after empowering the city to assess the cost of the improvement upon the abutting estates, provided that any owner, part of whose land was taken, might before the assessment elect to surrender his whole estate to the city, which should pay therefor its full value as it was before the improvement was made, and should have the right to resell the portion not required for the new street."

In 1918 the Chicago Bureau of Public Efficiency arrived at a similar conclusion after an examination of recent street widening projects in Chicago.*

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* Excess Condemnation. Report prepared by the Chicago Bureau of Public Efficiency. Chicago, Sept. 1918.

These reports present the practical considerations that have led to the enactment of excess condemnation laws and to the practice of excess condemnation in actual street improvements. We submit that these considerations demonstrate that the Ohio constitutional provision is a soundly reasoned enactment, in line with a widespread trend of law both in this country and abroad; that in actual practice excess condemnation has been considered a reasonable method of meeting problems arising out of street widenings; and that the practice is based upon sound reasons in furtherance of the public good. The law cannot, therefore, be said to provide for an arbitrary act of confiscation of private property.

We submit further that the project of the city of Cincinnati is consonant with the general practice of excess condemnation. An examination of the whole plan (Bk. Ex. Pff. 1) shows that from Main Street to Pike Street the new street will destroy twenty-five feet of the front of every building. This practically destroys these structures and the city would doubtless be compelled under the Ohio Law (Ohio Genl. Code Sec. 3688) to pay the total value of the structure. There will remain lots of land unsuitable to economical development in that neighborhood so long as they remain in separate ownership. This condition is particularly true in the section from Broadway to Pike Street where the existing ownership is more diverse, the individual lot frontage on Fifth Street smaller, and the proportionate destruction of buildings is greater. Considered as a whole municipal project in the light of the purposes of excess condemnation, we submit that the present project is a reasonable application of the powers of excess condemnation.

E. The Reasonableness of State Action in Exercising Eminent Domain is of Necessity a Matter of Historical Development and Local Needs

In the centuries when a road was merely a public right to travel over private property and when public buildings were the private property of the monarch, eminent domain meant little or nothing. When increasing travel required highways to be paved and maintained, and when public buildings became the property of the public rather than of the monarch, eminent domain began. When toll roads, toll bridges, railways, telephones and other public utilities came, the necessities of the case required the extension of the right of eminent domain even to these privately owned corporations on the theory that they obviously existed to supply a public purpose.

If the economic subsistence of a community depends on a particular business or industry, that business or industry is a vital public utility. Thus we have our federal government interfering by means of protective tariffs on behalf of infant and full grown private industries, and our federal and state governments maintaining departments for the benefit of private agriculture, mining, lumbering, tourist hotels, etc.

The real test in the extension of the application of eminent domain to any private interest is not whether the business or industry affected is public but rather whether the public advantage justifies the exercise. Farms on which the country's food is produced are very necessary utilities but there would ordinarily be no public advantage in giving to farmers rights of eminent domain. In arid areas, however, private farms not connected with irrigation systems cannot function for their owners or for the public if they are not permitted to condemn easements for private irrigation ditches. Therefore the public authority permits the private appropriation.

F. Supreme Court Decisions

In the early nineteenth century, most states authorized manufacturers operating by water power to flood private property for their mills on paying damages. The leading federal case was *Head* v. *Amoskeag Mfg. Co.,* 113 U. S. 9. In that case, the Court said, at page 26, that the New Hampshire statute authorizing such flooding

> "is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which, without some such regulation could not be beneficially used."

and further

> "Being a constitutional exercise of legislative power and providing a suitable remedy, by trial in the regular course of justice to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States." *Walker* v. *Sauvinet,* 92 U. S. 90; *Davidson* v. *New Orleans,* 96 U. S. 97; *Hartado* v. *California,* 110 U. S. 516; *Hagar* v. *reclamation District,* 111 U. S. 701.

In the case of *Clark* v. *Nash,* 198 U. S. 361, the land of Clark lay between the land of Nash and a river. Acting under a Utah statute, Nash sought to condemn a right of way over Clark's land for the purpose of bringing water from the river. Clark claimed that the condemnation was for a private use. In considering the validity of the statute the Court (p. 368) discussed the reasons that would support such an enactment and concluded that under the circumstances, it was valid, saying, at page 369:

> "This Court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its Courts, must in the nature of things be more familiar with such facts and with the necessity and occasion for the irrigation of the lands than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state Courts."

In *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527, the Mining Company, acting under a statute of the State of Utah, sought to condemn a right of way over the land of Strickley. The purpose of the right of way was to allow the construction of an aerial bucket line from the mine to a railroad so that ore might be loaded upon freight cars. Strickley claimed that the right of way was for the private use of the Mining Company and violated the Fourteenth Amendment. The Court held (Syl.):

> "There is nothing in the Fourteenth Amendment which prevents a state in carrying out its declared public policy from requiring individuals to make to each other, on due compensation, such concessions as the public welfare demands; and the statute of Utah providing that eminent domain may be exercised for railways and other means to facilitate the working of mines is not unconstitutional." *Clark* v. *Nash,* 198 U. S. 361 followed.

At page 531, the Court held:

> "In discussing what constitutes a public use it (*Clark* v. *Nash*) recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that

> there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment which prevents a State from requiring such concessions. If the state constitution restricts the legislature within narrower bounds that is a local affair, and must be left where the state court leaves it in a case like the one at bar.
>
> In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."

In the case of *Hairston* v. *Danville & Western Railway*, 208 U. S. 598, the railway company sought to condemn land belonging to Hairston for the purpose of building a spur track to a tobacco factory. Hairston claimed that the use was not a public one and violated the Fourteenth Amendment because the spur was to serve merely a private factory. The Court held that the use was public.

In the case of *Attorney General* v. *Williams*, 174 Mass. 476 (affirmed on other grounds by this Court in 188 U. S. 491), the question involved was the validity of a statute which prohibited the erection of a building more than one hundred feet in height on Copley Square in Boston while providing at the same time for compensation to owners injured in their property rights by the limitations created. The statute was sustained as authorizing an appropriation for the public use within the limitations of the Massachusetts Constitution.

In the case of *Old Dominion Land Company* v. *U. S.*, 296 F. 20 (C. C. A. 4, 1924), a direct case of recoupment by the federal government was before the court. The government had, in 1918, leased plaintiff's land for the period terminating July 30, 1922, with a proviso that the government should have thirty days after the expiration of the lease to remove any buildings it might erect thereon. The government erected on the property warehouses valued at $1,522,000 but with the termination of the war, the land and buildings had ceased to be used or needed for government purposes. The government apparently slept on its lease, and did not wake up until the lease period was almost at its end. To save its investment, it sought to negotiate a renewal of the lease or a purchase of the land. The owning company in the apparent belief that it was about to become, by due process of law, the owner of valuable improvements without cost to itself on the termination of the lease, refused to negotiate on any reasonable basis. The government was not using the property and did not contemplate any use of it. In fact, two days before the expiration of the lease, it leased its own rights to a private individual for six months, revocable at will. Nevertheless on the very day before expiration, it instituted condemnation proceedings. The owning company sought to prevent condemnation on the ground that no public use was in contemplation and that the appropriation was for financial gain only, to-wit, to save the building investment.

The Circuit Court of Appeals in that case said at page 22 of their opinion:

> "Even, however, if the Congress had expressed the intention to dispose of the warehouses and land, we think the condemnation would, nevertheless, have been for a public purpose and use. The term 'public use' cannot be limited by inflexible definition."

and further, on the same page,

> "Since the price of the land could not be agreed on, the only method of preventing an immense unearned gain to the land-owner was the condemnation of the land. To hold such a condemnation not to be for a public use would be to give away immense public treasure by a narrow and technical limitation of the meaning of 'public use.' "

The Supreme Court affirmed the decision of the Court of Appeals in *Old Dominion Land Co.* v. *U. S.*, 269 U. S. 55. On page 66, the Court say:

> "Congress has declared the purpose to be a public use, by implication if not by express words * * *. Its decision is entitled to deference until it is shown to involve an impossibility."

In each of the cases cited above the Court has approached the question of public use as one to be determined by the reasonable character of the purpose and means. In the Head case it was found reasonable to allow one man's land to be flooded by another in order to further a manufacturing process. In the Clark case the Court held that the State of Utah was not going beyond the bounds of reason in allowing Nash to use Clark's land in order that he might irrigate his own fields. The same principle runs through the Strickley case, the Hairston case and the Williams case. The Old Dominion case seems to go even farther and to hold that the action of a legislative body is to be sustained unless it can be said that it involves an impossibility.

We submit that under these authorities the provisions of the Ohio Constitution constitute a perfectly reasonable exercise of the right of eminent domain and cannot be said to be an act of arbitrary confiscation going beyond the pale of a legal enactment of government.

In fact, even if public use were to be accepted as the test of due process of law, these decisions justify excess condemnation as an exercise of eminent domain. The purpose of excess condemnation "is not a private benefit as it was in the case above cited of a ditch for irrigation or a railway to a mine," but it is public in every aspect. See *Noble State Bank* v. *Haskell,* 111 supra.

G. Analogy of Cases Under the Police Power and the Power of Taxation

We have seen that eminent domain is one of the sovereign powers of a state subject to the constitutional limitation of due process of law. It is very similar in this respect to the police power of the state and to the power of taxation. The outstanding distinction is that eminent domain gives particular compensation to the individual while the other powers do not.

In discussing the constitutional limitations upon eminent domain it will be helpful to discuss briefly this Court's views on analogous cases within the realm of the police power and the power of taxation.

The rule as to the limitation of due process of law upon the state's police power is too well established to require extended discussion. This Court will not set aside a state statute exercising the police power unless the law is clearly arbitrary and unreasonable. In *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 584, it was said:

> "We need not labor the point, long settled, that where the legislation is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision."

We shall therefore merely suggest cases under the police power which seem to throw light upon the present exercise of eminent domain.

Zoning Cases. In the recent cases of *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, and *Gorieb* v. *Fox,* 274 U. S. 603, this Court sustained the right of municipalities to enforce compulsory zoning systems and street setback lines unless the ordinances were clearly arbitrary and unreasonable.

In the Gorieb case, the Court conclude their opinion by saying:

> "Since upon consideration we are unable to say that the ordinance under review is 'clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals, or general welfare,' we are bound to sustain it as constitutional. *Euclid* v. *Ambler Co.,* supra, p. 395."

These zoning ordinances unquestionably deprive an owner of property rights. For the public welfare, they restrain him from making certain uses of his property which prior to the enactment of the ordinance he was able to make without question. However, even where the zoning results in loss in land value, the Court will not interfere with a reasonable zoning system.

In a very real sense the ordinary excess condemnation undertaking is a zoning enterprise on an equitable basis. The city cannot very well compel the owners of mutilated buildings to tear them down and erect suitable ones. Nor can it compel the owners of remnant lots to aggregate them and resubdivide them in harmony with the improvement. To make possible the achievement of these ends, the city compensates the owners for their remnants, aggregates them, resubdivides them and *sells them with restrictions which are suitable to the zone created by the improvement.*

Noble State Bank v. *Haskell,* 219 U. S. 104. Here a state statute requiring state banks to pay one per cent of their average daily deposits to a Depositors Guaranty Fund for the benefit of all depositors in the state banks was sustained under the due process clause.

Rent Law Cases. Block v. *Hirsh,* 256 U. S. 135 and *Marcus Brown* v. *Feldman,* 256 U. S. 170. These cases sustained laws requiring reasonable rents and denying the right to repossess except on certain grounds.

Welch v. *Swasey,* 214 U. S. 91, sustained a law limiting the right to erect buildings of more than a specified height.

These cases illustrate that under the police power property may be taken and due process of law is not violated if the state's act is not clearly an arbitrary and unreasonable exercise of power.

The sovereign power of taxation is likewise subject to the limitation of due process of law. In *Jones* v. *Portland,* 245 U. S. 217, 221, the rule of limitation is stated as follows:

> "It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the power of the state."

In that case an ordinance of Portland, Maine, providing that moneys raised from taxation should be used to establish and maintain a yard for the sale of coal, wood and fuel without profit was sustained as not taking a taxpayer's property for uses which were private.

In *Green* v. *Frazier,* 253 U. S. 233, it was claimed that a statute engaging the state in the business of manufacturing and marketing farm products and using the power of taxation for such purpose violated due process of law. The Court held that the due process clause contained no specific limitation upon the taxing power but "it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes," (p. 238). "With the wisdom of such legislation, and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm is not within our province to inquire," (p. 240). The Court decided that since the highest Court, the people of the state with the sanction of the constitution and its legislature had decided to enter upon such an enterprise, in view of local conditions, "we are not prepared to say that it is within the authority of this Court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision." (p. 243.)

These cases have been followed and their doctrine applied by various lower federal courts. In *Mutual Oil Co.* v. *Zehrung,* 11 F. 2nd. 887, the charter of Lincoln, Nebraska, empowering the city to engage in the business of selling gasoline and oil was held not to violate the Fourteenth Amendment. In *Gallardo* v. *Porto Rico Ry. Light and Power Co.,* 18 F. 2nd. 918, the First Circuit Court of Appeals held that the Porto Rico Water Power Act levying a tax to allow the territory to sell water and electric power was a valid exercise of power and not for a private purpose. It was further held that the possibility of profit to the public treasury did not alter the case. The Eighth Circuit Court of Appeals in *Goodman* v. *School District of Denver,* 32 F. 2nd. 586, held that operation of a restaurant by a school district, using tax funds, was not a violation of due process of law.

These cases under the police power and the power of taxation, both, like eminent domain, subject to the limitation of due process of law, illustrate the attitude of federal Courts toward such powers when challenged under the due process of law clause of the Fourteenth Amendment. We submit that the same principles should control in considering the effect of the Fourteenth Amendment upon a state's exercise of eminent domain.

H. Unequal Protection of the Laws

In addition to their claim on the ground of due process of law, plaintiffs have alleged, in their petitions, that the application of the excess condemnation ordinance in these cases deprives them of the equal protection of the law. Their claim is that they are discriminated against by reason of the fact that the city did not appropriate the excess in the case of the Masonic Temple property and the Fontbonne property, and that it did not appropriate any property on the north side of Fifth Street.

The claim of unequal protection of the laws has not been seriously argued by plaintiff nor considered by either of the courts below. The Circuit Court of Appeals made no reference to the point in their opinion. The district judge referred to it as follows (R. p. 33):

> "If the city be justified in condemning property, it may make selection of that property which it will condemn, and the fact that certain property is not condemned as on the north side of the street, will not affect the validity of the condemnation of other property, as upon the south side of the street, for the very reason that there is no obligation not to condemn. That resting in the discretion of the city, these particular plaintiffs are deprived of no rights which they hold as of right, assuming the condemnation to be valid. The condemnation may be invalid under the Fourteenth Amendment but not because, in the attempt to exercise the right to appropriate, the city has considered it necessary to take the property of one but not of another."

We believe that this disposes of the claim. For further authority, however, the Court is referred to the following:

20 C. J. 624.
Sears v. *Akron*, 246 U. S. 242, 251.
Shoemaker v. *U. S.*, 147 U. S. 282.

U. S. v. *Gettysburg Elec. Ry. Co.*, 160 U. S. 668.
Boom Co. v. *Patterson*, 98 U. S. 403, 406.
Adirondack Ry. Co. v. *New York*, 176 U. S. 335, 349.
Southern Railway Co. v. *Memphis*, 126 Tenn. 267.

A glance at the appropriation plat (Pff. Ex. 1, Bk. of Exs.) will show that the city followed a reasonable plan. Reference has heretofore been made to the exceptions on the south side (pp. 5, 6). As to the claim that the north side of Fifth Street should have been taken, the answer is that the council was not obliged to do so and apparently considered it unwise. It might be said, furthermore, that inasmuch as the widening is on the south side of Fifth Street, the right to appropriate excess property on the north side is subject to question.

I. The Opinions of the Lower Courts

The reasoning of both lower courts in arriving at their conclusion is simple though not convincing. Analyzed, it reduces itself to the following:

Premise 1. The sole purpose of the city of Cincinnati in applying excess condemnation to the Fifth Street improvement is to recoup out of increased values a part of the expense of the improvement. (R. pp. 28-29; p. 106.)

Premise 2. Recoupment for the benefit of the public is not a public use. (R. p. 31; p. 107.)

Conclusion. Therefore the appropriation is a taking of property without due process of law.

Counsel believe that both the premises on which the conclusion rests are unsound.

1. Recoupment not the Sole Purpose of the City

The assumption that financial recoupment is the sole purpose of the city in these appropriations is unsupported. Council's resolution of intent merely states generally that the excess appropriation "is in furtherance of the said widening of Fifth Street and is necessary for the complete enjoyment and preservation of said public use." (R. p. 7.) The appropriating ordinance appropriates the excess "in furtherance of the public use set forth in Section 1 (to-wit, "street purposes for the widening of Fifth Street"), and for the more complete enjoyment and preservation of the benefits to accrue from said public use." (R. p. 89.)

The foregoing is practically all the evidence which directly shows the purpose of the city. If recourse is had to the pleadings, the Court will find the city's position stated respectively as to each of the three tracts on pages 8-10, 46-48 and 62-64 of the record. In each case, the answer of the city summarizes its claims as follows (R. 10, 45, 64):

> 1st. That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets, by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage.
>
> 2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effectuating the improvement.

Obviously an impersonality such as a city cannot very well testify as to what its plans and hopes are, but any Court ought to take judicial notice of at least two things in the situation presented, to-wit:

> (a) That placing in the hands of the city the elimination of the old buildings to be mutilated by the street widening is a desirable object. (That the city council had this in mind is shown by the fact that they permitted two fine large buildings to stand because they had been constructed to conform to the proposed improvement.)

(b) That the immediate aggregation of small parcels and parcels of irregular shape is a desirable object in the laying out of property along a newly widened highway.

When the improvement is completed, council will doubtless be in a position to determine what size tracts and what kinds of restrictions will be best suited for the harmonious development of the south side of Fifth Street. The Ohio Constitution contemplates that the city "may sell such excess with such restrictions as shall be appropriate to preserve the improvement made." It must be presumed that the city will proceed in a constitutional manner if it sells the excess. In so far as it can do so in advance of an actual determination to sell, the city has indicated that its purpose is to provide for such restrictions on possible resale as may be appropriate. In its resolution declaring its intention to appropriate, the city declared (Defts. Ex. A, Rec. p. 87), that the excess was taken "in furtherance of the said widening of Fifth Street . . . and is necessary for the complete enjoyment and preservation of said public use."

The city may never resell the excess. It is not compelled to do so by the constitution. That is a question to be determined in the future. Recoupment can come only from a sale and we submit that until the city by some act evidences an intent to sell, it cannot be said to be proceeding only on a theory of recoupment. The city has declared that it takes the excess to "preserve the said public use" and that is exactly what the Ohio Constitution empowers it to do. It may preserve the public use in many ways; sale with restrictions is one that may be chosen in the future. But we are not warranted upon such a record in discarding every possible use in favor of a use by sale that may, among other things, result in a possible recoupment, and then going a step farther and concluding that recoupment is the only purpose of the appropriation.

In view of the foregoing, it appears to counsel for the city of Cincinnati that the courts below erred in assuming that the sole purpose of the city of Cincinnati was financial recoupment.

2. *Recoupment for the Benefit of the Public is a Public Use*

The self-contradictory Premise 2, set forth under heading I, is, of course, not so baldly stated in the opinions, but it is a necessary basis, in all its baldness, for the conclusion the courts arrived at. Both courts realized the contradiction and attempted to escape it. The District Court opinion says (R. p. 31):

> "The court feels that, at least a public use must be a use of the property for the benefit of the public, a use of the property for some period, short or long, a use of the property as property for the benefit of the public."

Counsel submit that the foregoing makes clear that the Court recognizes and seeks to evade the fact that even on the recoupment basis, the purpose of the appropriation is the public benefit.

The Circuit Court of Appeals say (R. p. 107):

> "Public benefit has been spoken of by some of the courts as a public use, but properly so only with respect to the case at hand, and where the public interest is so paramount as to require the subject matter for a public use. None of the cases relied upon by the city, some of which are cited in the margin, by analogy or otherwise, holds that such a use as the city proposes to make of these properties is a public use. In none of them has the use been found to be of a public character

> because of financial benefits to the condemnor or taker, as such, but it uniformly has been made to depend upon a use so dominently and directly related to the public as to be indispensable to its welfare."

As in the case of the District Court opinion, the foregoing is an attempt to narrow the application of "public benefit" as a test of "public use."

In this connection, counsel submit that the case of *Old Dominion Land Co.* v. *U. S.* (296 F. 20 and 269 U. S. 55) is a direct authority to the effect that the financial gain of the public is a proper public use. That decision can be justified on no other basis, unless one is to close one's eyes to the obvious facts.

The District Court plainly regarded recoupment as a reasonable purpose to be attained by eminent domain under certain circumstances. In the opinion the Court holds (Rec. p. 30), that where a condemnation cuts through a building and destroys it so that the value of the building exceeds the value of the excess land upon which it stood:

> "In such cases the improvement upon the property appropriated being practically destroyed it would seem that the city should be given the privilege of taking such property in its entirety and of availing itself of any value in the real estate that might remain by way of recouping some of the damage sustained or some of the compensation required through the destruction of such improvement."

This seems to justify the taking of remnants for the purpose of recoupment while at the same time denying the propriety of recoupment. We submit that this will not stand the test of logic. If recoupment is reasonable in the case of a remnant, every consideration that leads to such a conclusion will apply to a situation where the excess property is more than a remnant. The difference is entirely one of degree, not kind.

There is nothing unreasonable *per se* in the idea that the public should seek to regain a portion of the expense of an improvement through the resale of the excess land. Certainly no private interest is served by such a proceeding. If the excess is resold the increment of value created by the city by reason of the improvement goes into the public treasury. Thereby the financial burden upon all taxpayers is reduced and the net cost of the improvement is decreased. We are unable to see wherein any private interest or individual can profit from such a result. Nor can we see where the property owner suffers financial loss. He is paid the full value of that which is taken from him. This includes the value of land including any advantage of location or particular use, as well as the value of structures. It may not include the possible increment of value due to the improvement the city makes. This is because at the time the land is taken this increment does not exist; in fact it may never exist. It should also be pointed out that this increment is created solely by the public and therefore it is not unreasonable or unjust that it should inure to the public advantage. As a matter of fact if there be any private gain in this entire situation it arises from the landowner receiving this increment of value from an improvement paid for and created by the public at large, not from the public receiving the financial benefit of value which it creates.

3. The City is Acting Under the Ohio Constitution

There is a labored effort on the part of the District Court and the Court of Appeals to hold the instant application of excess condemnation unconstitutional without setting aside the provisions of Art. XVIII, Sec. 10, of the Ohio Constitution. This led the District Court to indicate what it thought the constitution meant by excess condemnation. It suggested (Rec. pp. 26-27) that Sec. 3677-12 of the General Code of Ohio (providing for excess condemnation in connection with the approach to public buildings), was passed with reference to the constitutional provision and offered an example of the constitutional use of excess condemnation. Unfortunately for this view, Sec. 3677-12 was passed in 1904 (97 O. L. 333), and its constitutionality was never questioned. The constitutional amendment was adopted by the people in 1912. The Court of Appeals stated, "We do not hold that the provisions of the state constitution might not be validly enforced in a proper case" (Rec. p. 108), but counsel submit that no type of excess condemnation can be stated that is not fairly tested in the three cases at bar. We are unable to understand the Court's suggestion that the constitutional provision of Ohio means a condemnation of excess land in furtherance of the "use and preservation of the street for the purposes of travel" (Rec. p. 108). Such an interpretation, we submit, renders the provision either meaningless or useless. The Court referred to a condemnation of extra land necessary for lateral support (Rec. p. 107). But as the District Court pointed out (Rec. p. 27), this power the municipality always had and no constitutional provision was needed for its exercise. See *Dodson* v. *Cincinnati,* 34 O. S. 276, decided in 1877.

The Court further suggests (Rec. p. 107), that the constitution may provide for an excess taking of a remnant of land remaining in a lot after improvement. We submit that the Ohio Constitution neither expressly nor impliedly contains such a restriction and that the distinction between the condemnation of remnants and the broad powers granted in the constitution was too well known in 1912 for the framers of the constitution to mean by their language merely the appropriation of remnants.

We submit that a study of the Ohio constitutional provision together with those of other states providing for excess condemnation demonstrates that the application made by the city is that contemplated by the constitution. To attempt to sustain the constitution and condemn the appropriation made by the city in these cases would be, we submit, mere verbal legerdemain, preserving the letter while destroying the substance.

4. Authorities Relied on by the Lower Courts

Neither of the lower courts in its opinion, cited a single case in which a federal court has set aside a state enactment authorizing the appropriation of private property. The District Court, in its citations, limited itself to attempting to distinguish the cases of *Clark* v. *Nash*, *Strickley* v. *Mining Company*, and *Old Dominion Land Co.* v. *U. S.*, which have all been referred to above, and which, so far as they go, are in harmony with the position of the city.

The Circuit Court of Appeals in its opinion cited ten cases in all. Two of these (R. p. 105), are Ohio Supreme Court cases on the question of injunction as a proper remedy. The cases of *Hairston* v. *Railway*, 208 U. S. 598; *Lime Co.* v. *Railway Co.*, 223 U. S. 211, and *Jones* v. *Portland*, 245 U. S. 217, are referred to as showing that "great deference should be paid to the decisions of the courts of a state in determining what is a public improvement." The case of *Irrigation Co.* v. *Bradley*, 164 U. S. 113, is cited as authority to the effect that:

> "Whether the use is public or private depends necessarily upon the facts relating to the particular subject matter involved."

The case of *Old Dominion Land Co.* v. *U. S.*, 269 U. S. 55, is cited in an effort to distinguish it from the case at bar.

The remaining three cases, together with the Irrigation Company case and the Hairston case, just mentioned, are referred to on pages 106-107 of the record as follows:

> "It is the law now, as it always has been, that the due process clause of the constitution applies to the state and all of its agencies. *Railroad Co.* v. *Chicago,* 166 U. S. 226; *Railway* v. *Railroad Co.,* 166 U. S. 557. It is equally well settled that condemnation for a non-public use is a denial of due process of law (*Irrigation District* v. *Bradley,* 164 U. S. 112; *Traction Company* v. *Mining Co.,* 196 U. S. 239); and that whether the use is public or private is a judicial question. *Hairston* v. *Railway Co.,* 208 U. S. 598. This latter question is sometimes difficult of solution."

The five cases just noted, would seem to constitute the dependence of the Circuit Court in its opinion. Yet, so far as the questions at issue in those cases are concerned, they in no way help the Court's conclusion. In the case of *Railroad Company* v. *Chicago,* 166 U. S. 226, the city of Chicago condemned a right of way for street purposes across the railroad company's tracks. The jury assessed the compensation at one dollar. The railroad company claimed error on the ground that this amounted to a taking of private property without compensation, and therefore violated the Fourteenth Amendment. The Court agreed that due process of law required that provision for compensation was a necessary element in any law for the appropriation of private property for public use. The Court, however, affirmed the state court in sustaining the verdict on the theory that the jury had found, in effect, that the railroad company had suffered no loss by the appropriation.

The case of *City Ry. Co.* v. *Citizens R. R. Co.* did not arise at all under the Fourteenth Amendment. Its holding was that a certain extension of franchise to the Citizens R. R. Co. granted in 1880 to expire in 1901, was a valid contract and that an ordinance of the city of Indianapolis declaring it invalid and granting a new franchise to the City Railway Co. was a "law impairing the obligation of contract."

The case of *Fallbrook Irrigation District* v. *Bradley*, is distinctly favorable to the city's position in the cases at bar. The California law provided for the establishment and development of irrigation districts at the expense of the owners of the land included in the respective districts. Mrs. Bradley's property was without her consent included in such a district and was assessed to pay part of the expense. The first assessment not having been paid, proceedings were brought under the act to sell her land. She sought to enjoin on the ground that the proposed irrigation district was of no benefit to her and inured not to the public use but to the private benefit of some of the landowners whose lands would be increased in value. The Court held the use public and sustained the act.

The case of *Traction Co.* v. *Mining Co.*, 196 U. S. 239, seems to decide nothing more than that where diversity of citizenship exists a property owner may transfer to a federal court an action to assess compensation for property appropriated.

The case of *Hairston* v. *Railway Co.* has already been referred to by the city. It sustained the appropriation of a private right of way for a railway spur track.

Nothing in any of the foregoing cases supports the conclusion of the lower courts that the excess appropriation here is not for a public use. Both lower courts referred, without citing them, to certain state cases, in which excess appropriation statutes had been declared unconstitutional. The Circuit Court say, in their opinion (R. p. 108):

> "The courts of last resort in Massachusetts, New York, Virginia and Pennsylvania have held that the

statutes of those states (meaning excess condemnation statutes), at least for the purposes here involved, *were a denial of due process of law.*"

This statement of the Court is not accurate. The cases referred to are the following:

Matter of Albany Street, 11 Wend. (N. Y.) 149.
Opinions of Justices, 204 Mass. 607.
Opinions of Justices, 204 Mass. 616.
Opinions of Justices, 211 Mass. 624.
Mutual Life Insurance Co. v. *Philadelphia,* 242 Pa. St. 47.
City of Richmond v. *Carneal,* 129 Va. 388.

In each of these cases the Court interpreted a state statute on the basis of its understanding of its own state constitutional provisions; in none of them was the constitution of the United States relied on, and in none of them was "due process of law" invoked. In the New York case, decided in the year 1834 (prior to the adoption of the Fourteenth Amendment), the Court arbitrarily held that the legislature had no power to authorize a municipality to take the fraction of an inch more than it intended to use, no matter how small the remnant. In Massachusetts, the holdings were that the legislature could not authorize the expenditure of money raised by taxation to purchase property which was not to be directly used for a public improvement. In the Pennsylvania and Virginia cases, the Court defined public use as equivalent to "use by the public," a definition long since discarded by the federal courts. Furthermore, it is to be noted that the answers to the several decisions in New York, Massachusetts and Virginia have been the adoption of constitutional amendments to specifically confer on the legislatures the necessary authority.

The Pennsylvania and Virginia cases rested squarely upon the point that the respective state constitutions limited eminent domain to public use and that public use meant actual occupancy by the improvement. These states had expressly limited their own powers in a way that precluded any use of excess condemnation. The decisions, therefore, are not authoritative in a case where the state has by its constitution authorized excess condemnation. They especially have no weight in the federal jurisdiction where, as we have seen, the courts have expressly rejected the view that public use must mean use by the public.

We submit that there has been no decision, state or federal, that a state constitution or statute providing for excess condemnation violates the Fourteenth Amendment of the United States Constitution.

5. Difficulties of the Decision of the Lower Courts

The decisions of the lower courts on the question at issue and the reasoning on which they rest, result in certain corollaries which demonstrate the difficulties involved in the conclusion reached by them. The more important of these may be stated as follows:

1. Excess condemnation and due process of law may not exist together in the same governmental jurisdiction.
2. Foreign countries may authorize excess condemnation because their citizens do not enjoy the protection of due process of law.
3. If the citizens of the several states of the Union desire to enjoy the undoubted public benefits of excess condemnation, they must eliminate from their federal and state constitutions the protection of due process of law.
4. The excess condemnation attempted by the city of Cincinnati for the public benefit must be considered as being *for a private use.*

IV. CONCLUSION

1. The traditional system of laying out new streets or widening or altering existing ones or of laying out other important public improvements, under which only the land actually to be used is appropriated, is productive of serious public disadvantage, from the point of view of city planning and sound public financing.

2. Excess condemnation is recognized as a solution of many of the difficulties of the traditional system.

3. Excess condemnation being a beneficent practice intended for the public good, it is within the sovereign power of any government to enact it into law.

4. The "due process of law" clause in the Fourteenth Amendment is not intended to prevent the enactment of beneficial legislation by a state.

5. "Due process of law" is an inherent characteristic of all free governments, controlling them independently of written constitutions. It means "the law of the land" or "a government of laws and not of men."

6. The incorporation of "due process of law" into the federal constitution did not affect the valid law making powers of any state. It merely gave the federal government jurisdiction to prevent any state from enforcing as law an act of tyranny and oppression which could have no just foundation in reason.

7. The Fourteenth Amendment does not require that the taking of private property by eminent domain under state authority must be for the "public use." By failing to follow the language of the Fifth Amendment, the framers of the Fourteenth Amendment refused to restrict state rights of eminent domain except as the assertion of those rights might violate "due process of law."

8. Although the Supreme Court has in numerous decisions referred to "public use" as a test of "due process

of law" in eminent domain cases, it has never set aside a state statute of eminent domain and by identifying "public use" with "public benefit" or "public purpose," it has left the states free to consider their own public purposes in their uses of eminent domain.

9. Excess condemnation as authorized by the constitutions of Ohio and other states has in view solely the public welfare. It aims at no private injury or advantage.

10. In practice excess condemnation does no injury to the individual. It compensates him in full. The only sacred right of which he is deprived is the right to speculate on an anticipated increase in land value arising out of the projected improvement.

11. The cases under consideration are typical cases of excess condemnation. The plats and the other evidence show a reasonable application of the power and that the city council was actuated by no considerations other than the public welfare. If these applications of excess condemnation are invalid, excess condemnation may be considered of no practical value.

We therefore submit that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

John D. Ellis,
City Solicitor.

Ed. F. Alexander,
Assistant Solicitor.

APPENDIX

Constitutional Provisions as to Excess Condemnation in States Other Than Ohio

Massachusetts

Art. 70. (Rearrangement.) The general court may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street; provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or streets, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions. (Adopted 1911.)

Art. 66. (Rearrangement.) The general court shall have power to authorize the commonwealth to take land and to hold, improve, subdivide, build upon and sell the same, for the purpose of relieving congestion of population and providing homes for citizens; provided, however, that this article shall not be deemed to authorize the sale of such land or buildings at less than the cost thereof.

(Adopted 1915.)

Wisconsin

Art. XI, Sec. 3a. The state or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air and usefulness of such public works. (Adopted 1912.)

New York

Art. I, Sec. 7, Paragraph 2. The legislature may authorize cities to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased. (Adopted 1913.)

Rhode Island

Art. XVII, (Amendment). Sec. 1. The general assembly may authorize the acquiring or taking in fee by the state, or by any cities or towns, of more land and property than is needed for actual construction in the establishing, laying out, widening, extending or relocating of public highways, streets, places, parks or parkways: Provided, however, that the additional land and property so authorized to be acquired or taken shall be no more in extent than would be sufficient to form suitable building sites abutting on such public highway, street, place, park or parkway. After so much of the land and property has been appropriated for such public highway, street, place, park or parkway as is needed therefor, the remainder may be held and improved for any public purpose or purposes, or may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease, the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same. (Adopted 1916.)

Constitution of Virginia

Sec. 58. * * * It (the general assembly) shall not nact any law whereby private property shall be taken or amaged for public uses, without just compensation, the erm "public uses" to be defined by the general assembly. * * (Adopted 1928.)

California

Art. I. Sec. 14½. The state, or any of its cities or counies, may acquire by gift, purchase or condemnation, lands or establishing, laying out, widening, enlarging, extendng, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred and fifty feet from the closest boundary of such public works or improvements; provided that when parcels which lie only partially within said limit of one hundred and fifty feet only, such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

The legislature may, by statute, prescribe procedure.

(Adopted 1928.)

Michigan

Art. XIII, Sec. 5. In exercising the powers of eminent domain and in taking the fee of land and property that is needed for the acquiring, opening and widening of boulevards, streets and alleys, municipalities shall not be limited to the acquisition of the land to be covered by the proposed improvement, but may take such other land and property adjacent to the proposed improvement as may be appropriate to secure the greatest degree of public advantage from such improvement. After so much of the land and property has been appropriated for any such needed public purpose, the remainder may be sold or leased with or without such restrictions as may be appropriate to the improvement made. Bonds may be issued to supply the funds to pay in whole or in part for the property so appropriated, but such bonds shall be a lien only on the property so acquired and they shall not be included in any limitation of the bonded indebtedness of such municipality.

(Adopted 1928.)

SEP 2
CHARLES EL

Nos. 372 - 373 - 374

In the Supreme Court of the United States

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
MARGARET W. VESTER.

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
JAMES S. RICHARDS and PASCHAL L. RICHARDS.

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
LLEWELLYN B. REAKIRT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI.

John Weld Peck,
Attorney for Respondents.

√Milton Sayler,
Frank H. Shaffer, Jr.
Of Counsel.

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THE SCOPE OF THE CASE.

We can not agree with our opponents that this record presents the whole question of the right of excess condemnation, but feel that it only involves that right when pushed to the extent of condemning land for the purpose of reselling it for profit. The condemnation enjoined by the District Court was such an attempt on the part of the city. It was not in furtherance of the public use of the twenty-five foot strip taken to widen the street.

Judge Hickenlooper (then District, now Circuit Judge), who heard the cases on the evidence, in his opinion said (R. p. 28):

> "It is frankly conceded, I think, in argument if not in the evidence, that the purpose of this excess condemnation was the recoupment, by dealing in real estate, of a large portion of the heavy expense necessary for this project. So far as we have been able to analyze the evidence, this is the only motive or purpose of the excess condemnation, the only method in which such excess condemnation can, in the language of the constitution, be in furtherance of the public use. Not even slight suggestions are given to the Court as to the restrictions which shall be imposed in case of resale to preserve the improvement made, except and unless such restrictions may be considered as founded upon the intent to aggregate the numerous parcels so appropriated, or to consolidate into one ownership a multiplicity of individual ownerships."

Again (R. p. 31):

> "Certainly, the mere appropriation of excess for the purposes of resale at a profit is not in furtherance of the purpose of the municipal improvement here, which is the construction of a street or highway. Nor would any restrictions that might be imposed upon the resale of this property in any way affect or preserve the improvement of the street. In fact, the only suggested restrictions have been that the city might aggregate the separate parcels and thus restrict building in this vicinity to that of such size and nature as would improve the entire locality and benefit the community as a whole. This is not a restriction in support of or connected with or in any way preserving the improvement of Fifth Street."

And finally (R. p. 33):

> "On the whole, we are unable to believe that the only possible ground for this excess condemnation which is disclosed or even suggested in the present

> cases, that is, the dealing in real estate for profit, bears any such close connection with the improvement or constitutes such a public use as would justify this excess condemnation."

The broad question of excess condemnation generally is not, therefore, essentially involved in this case; only the alleged right to take property for resale at a profit; that is to say, for speculation.

Both of the lower courts expressly recognize in their opinions that there may be a proper field and scope for excess condemnation. The District Court pointed out (R. p. 27) that the Legislature of Ohio has incorporated in the General Code of the State, Section 3677-12, the right on the part of municipalities to condemn excess property for the protection of public buildings and their environs, to preserve the view, appearance, light, air, and usefulness of public grounds occupied by such buildings and esplanades and parkways leading thereto. This was so even before the constitutional amendment.

The Court of Appeals, in its opinion (R. p. 108), 33 Fed. (2nd) 242, says:

> "We do not hold that the provision of the state constitution might not be validly enforced in a proper case, but that as applied by the city in these cases it violates the 'due process of law' clause of the constitution."

Therefore the opinions of the courts below have not, as claimed, rendered the Ohio constitutional amendment ineffective, or made impossible the application of that principle in the various states which have like amendments, but have only confined the application thereof to cases in which the excess taken is in some substantial degree really and genuinely to be used or restricted in furtherance of the primary purpose of the main appropriation.

In the same resolution by which the city condemned the twenty-five foot strip for the widening of Fifth Street it undertook to appropriate certain irregular additional areas, near but not always adjacent to this strip, which were stated in the resolution to be "in excess of that actually to be occupied by said improvement." These included the tracts in question. No statement of the use to be made of these areas was made, either in the ordinance or in the petition to assess compensation although the statute requires:

> "When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, *defining the purpose of the appropriation*, setting forth a pertinent description of the land," etc. *G. C. Sec.* 3679,

the city contenting itself with the bare assertion that they were wanted "for the more complete enjoyment and preservation of the benefits to accrue from the taking of the twenty-five foot strip," but by what usage, how or why, was not stated. Later, however, by its answer filed in these cases (R. 10), the city alleged the use to be made of the excess property in the following language:

> "1st. That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets, by using or disposing of its excess in tracts of such size and nature and with such restrictions as will inure to the public advantage.
>
> "2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effecting the improvement."

The first is in the alternative, vague and indefinite and really states no purpose whatever. On the evidence and statements of counsel in argument the District Court found the second of the above allegations to represent the real, essential purpose of the appropriation. In short, it was proposed to take and resell this property at such a price as would help the city pay for the taking and paving of the twenty-five foot strip.

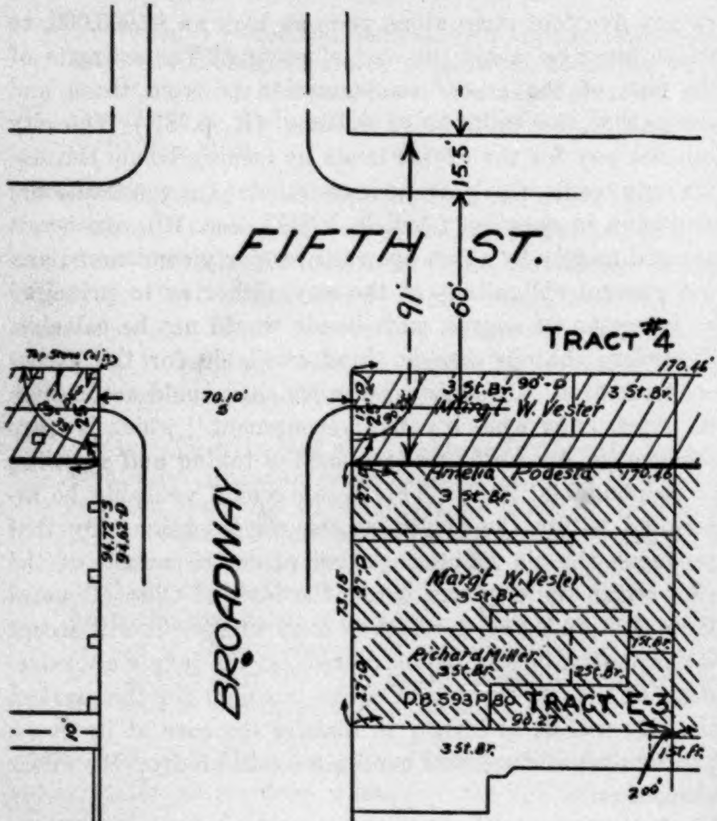
This finding and conclusion is reinforced by the facts concerning the financial situation of this project. The city has not the available funds with which to pay for this property. The total found available for the improvement is $1,600,000 and the city's estimate of the expense of the twenty-five foot strip alone runs as high as $2,000,000, to which must be added the cost of paving. The estimate of the cost of the *excess* condemnation is from three and one-half to five millions of dollars. (R. p. 81.) The city can not pay for the excess lands by issuing bonds because the only bonds which can be issued under the constitutional provision in question (Article XVIII, Sec. 10), are bonds secured merely by a lien upon the property condemned and not general obligations of the city, either as to principal or interest. Of course, such bonds would not be saleable. Therefore the city has no fund available for the excess condemnation. The only way in which it could accomplish its object is by what it calls "recoupment," which is mere euphemism for profit made upon the taking and reselling of respondents' lands. This resale would probably be attempted within the period of the city's option. By that we mean the six months' period after the award of the jury which the city has, under the laws of Ohio (General Code Section 3697), in which to elect whether it will accept the property, or any parcel thereof, at the jury's appraisement or not. If the award prove too high for the market, the city will be at liberty to dismiss the case at its costs, paying counsel fees, and condemn again or drop the affair altogether.

Our position is that condemnation for "recoupment" is not due process of law, and, furthermore, that the burden of this recoupment has been thrown in this case upon these particular respondents with such unjust discrimination, compared with others similarly situated, as to deprive them of the equal protection of the laws.

We invite the Court's attention briefly to the facts concerning respondents' properties so proposed to be taken as such excess.

RESPONDENTS' PROPERTIES.

Mrs. Vester's Case.


FIFTH ST.
15.5'
91'
60'
TRACT #4
170.46'
3 St. Br.
90'-0
3 St. Br.
Margt W. Vester
Amelia Podesta
170.46
3 St. Br.
Margt W. Vester
3 St. Br.
Richard Miller
3 St. Br.
2 St. Br.
1 St. Br.
D.B. 593 P 80
TRACT E-3
90.27
3 St. Br.
1 St. Fr.
200'
73.15
27.9
70.10'
BROADWAY
94.72-3
94.62-0
10'
Top Stone

Mrs. Vester owns a house and lot fronting 27 feet on the east side of Broadway. No part of it is within the twenty-five foot strip. It lies 44 feet south of Fifth Street and therefore 19 feet south of the south line of the proposed improvement. The house is a good brick of three stories well in keeping with the general neighborhood, an entirely lawful structure offering no impediment whatever to the complete enjoyment and use by the city of its twenty-five foot strip. It is occupied by Mrs. Vester's son, a physician and surgeon, who desires to remain in the property.* (R. 12.)

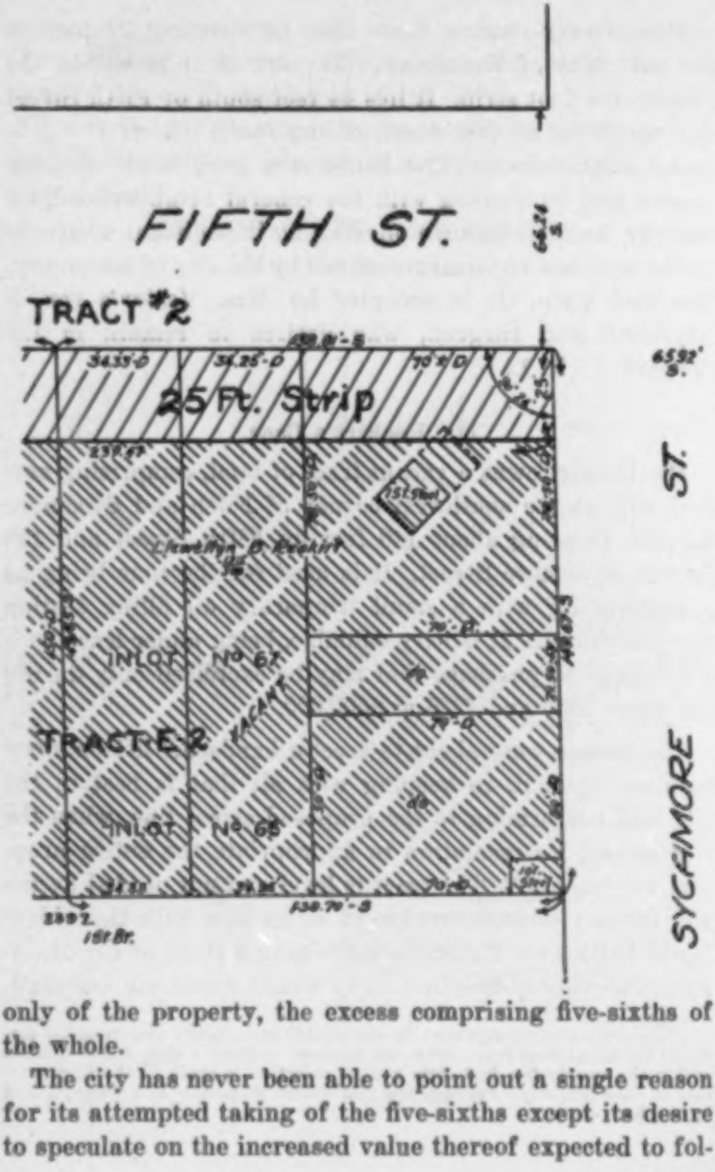
Mr. Reakirt's Case.

Mr. Reakirt owns a vacant tract of land, comprising several lots, at the southwest corner of Fifth and Sycamore Streets, fronting about 140 feet on Fifth Street and 150 feet on Sycamore Street. It is used for the time being as a parking lot with a small temporary oil filling station near the corner. It is very valuable, being under lease with a privilege of purchase that may be exercised only during the years 1955 and 1956 at $600,000.

The lessees were about to erect a handsome fifteen story building upon it, in keeping with all that is best in the city and conforming to the proposed street line, when the city passed its resolution to appropriate the entire property as "excess." The tract is level and not needed by the city for any physical reason in connection with the widening of Fifth Street, such as sustaining a slope or for drainage. The twenty-five foot strip would constitute one-sixth

---

* To avoid confusion, it may be stated that Mrs. Vester also owns the corner of Fifth and Broadway, where her husband conducts a drug store, which is within the twenty-five foot strip and no objection is made to the appropriation of that property. Between the two Vester properties is a parcel owned by another person.


FIFTH ST.
TRACT #2
25 Ft. Strip
INLOT No 67
VACANT
TRACT E-2
INLOT No 65
SYCAMORE ST.
34.35-D
70-D
139.70'-S

only of the property, the excess comprising five-sixths of the whole.

The city has never been able to point out a single reason for its attempted taking of the five-sixths except its desire to speculate on the increased value thereof expected to follow the widening of Fifth Street and the forceful aggregation of this tract with several others also condemned as excess.

The Richards Case.

The Richards brothers, James and Paschal, own a leasehold with privilege of purchase upon a well improved lot running through from Fifth Street to Buchanan Street, near Pike Street. The city proposes to take not only the front 25 feet, but the remaining 75 feet to the street in the rear.

INEQUALITY OF BURDEN.

The city has not been impartial in this excess condemnation, but, on the contrary, has exercised the discrimination of a speculator, as in this instance it is, selecting what it thinks it can sell at a profit when it has aggregated the holdings of the respondents and others. Thus, the property adjacent to Mr. Reakirt's is taken only to the depth of 100 feet, but Mr. Reakirt's property, being perhaps the most valuable vacant lot in the heart of the city at this time, is taken to its full depth of 150 feet.

The John Van Range Company building * fronts on Fifth Street and runs southwardly a hundred feet along Broadway just opposite Mrs. Vester's property. The front portion to a depth of 25 feet only of this building is to be taken, the remainder to be left standing; but Mrs. Vester is asked to surrender her property on Broadway directly opposite to the remnant of that building which will remain in private ownership. Indeed, as far as the physical situation is concerned, there might be some reason to take the entirety of the Range Company building because it will

---

* This building is owned but not used by the Cincinnati Masonic Temple Company. It is no part of the Masonic Temple building and apparently there is no intention to make it so because it is offered for lease for a long term and to be remodeled to suit tenants. (R. 12.)

be divided, whereas Mrs. Vester's property is an entirely independent parcel wholly outside the lines of the improvement, as has been said.

No property on the north side of Fifth Street is taken for purposes of "recoupment," although that will benefit equally by the widening. The "recoupment" is laid entirely upon selected parcels on the south side of the street. The Masonic Temple building, and the Fontbonne building, owned by the congregation of the Sisters of St. Joseph of New Orleans, adjacent to the twenty-five foot strip, are not condemned as excess, but the twenty-five foot strip in front of each of these buildings is condemned and is to be paid for.

Thus it will be seen that not only are the respondents' properties to be taken for the purposes of "recoupment" or speculation, but they are taken with unjust discrimination and the owners are thus deprived of equal protection.

It is said in the petitioner's brief that this improvement is part of a general scheme to improve the access to certain suburbs by street widening and the construction of a viaduct, all of which only goes to show that it would be a matter of convenience and pleasure to those so served, and a relief to taxpayers of the city at large, if a considerable part of the cost thereof could be obtained by appropriating and reselling the property of the respondents.

Petitioners allege in their brief that excess condemnation has been put into effect in certain cities in New York. This is not in the record and we do not know. It is not improbable that an examination of those instances, were they in the record, would show that the use of or restrictions to be placed upon the excess condemned had some real relation to the primary improvement other than mere speculation to pay its cost.

OUR PROPOSITIONS OF LAW ARE AS FOLLOWS:

Jurisdictional and Preliminary Questions.

1. *In Ohio a municipal condemnation case is merely an appraisal in which neither answer denying the right of condemnation, nor cross-petition, is permissible and injunction is the only remedy.*

P. C. C. and St. L. R. R. v. *Greenville*, 69 O. S. 497.
Sargeant v. *City of Cincinnati*, 110 O. S. 444.
State v. *Eastman*, 118 O. S. 121.

2. *An attempted condemnation for a non-public use deprives the citizen of his property without due process of law contrary to the Fourteenth Amendment and may be enjoined.*

Fallbrook v. *Bradley*, 164 U. S. 158.
Cavanaugh v. *Looney*, 248 U. S. 453.
Lewis on Eminent Domain, 3rd Ed., Sec. 315.

3. *Such appropriation may be enjoined under the Federal Constitution even though the state has attempted to authorize it by constitutional amendment.*

Re: *Tuthill*, 163 N. Y. 133, 49 L. R. A. 781 (1900).

4. *The Fourteenth Amendment protects against actions by a municipal corporation acting under power conferred by the state.*

The Home Telephone & Telegraph Co. v. *Los Angeles*, 227 U. S., p. 278, Syl. 5.

5. *Section 266, Judicial Code, denying right of injunction to stay proceedings in state court, does not apply because:*

The injunction here is not to enjoin the proceedings in the state court, but to enjoin the appropriation, which is primarily by ordinance, consummated by appraisal, payment and possession; also, because the proceedings in the state court are repugnant to the Constitution of the United States.

> *Wells-Fargo* v. *Taylor,* 254 U. S. 175, 183.
> *Smith* v. *Apple,* 264 U. S. 274, 279.

The Main Question.

6. *Excess condemnation, as here presented, is a taking not for public use and unconstitutional.*

This has been so held by every Court before which the question has come.

> *Re: Tuthill, supra.*
> *The Albany Street Extension,* 11 Wendell 148.
> *Bennett* v. *Boyle,* 40 Barbour 551.
> *Opinions of the Justices,* 204 Mass. 607.
> *Opinions of the Justices,* 204 Mass. 616.
> *Pennsylvania Mutual Life Ins. Co.* v. *Philadelphia,* 242 Pa. St. 47 (1913).
> *City of Richmond* v. *Carneal,* 129 Va. 388, 14 L. R. A. 1341.

It is true that except for the instant case these holdings have been by state courts under state constitutional provisions against taking without due process, but certainly the Fourteenth Amendment is no weaker than the state constitutions in this regard.

Re: Tuthill, supra. This case is interesting as an illustration of a state constitutional amendment authorizing a taking for a non-public use held violative of the Fourteenth Amendment.

The Albany Street Extension case, supra, held unconstitutional and void a portion of an act authorizing the appropriation of the whole of a lot when only part is required for the use of a street. The attempt was to take off of Trinity Church yard a strip in addition to that necessary for the purpose of widening Albany Street.

Bennett v. *Boyle, supra,* held the City Commissioners limited and restrained to the lines of the avenue as enlarged on the principle that the law of eminent domain extends only to lands needed for public use and no further.

In the *Opinions of the Justices,* two cases (*supra*), the Supreme Court of Massachusetts considered questions similar to those here involved, concluding as follows:

> "1. It is not within the power of the Legislature, in connection with the widening of a highway or the laying of a new highway in the city of Boston, to authorize that city to take by right of eminent domain real estate in excess of those parcels which in whole or in part are necessary for the highway itself, with a view to the subsequent sale by the city of such excess of real estate at its full value subject to conditions or restrictions designed to promote the commercial and industrial welfare or growth of the municipality by insuring an opportunity for the construction along such highway of buildings adapted to the requirements of commerce, trade and industry and especially to the requirements of those forms of business which to a large extent employ teaming, thereby relieving or helping to prevent the increase of congestion of traffic and so facilitating the transportation of freight and passengers through the section of the city in which such highway is widened or laid out."

In *Pennsylvania Mutual Life Insurance Company* v. *Philadelphia, supra,* it was held that:

> "1. The constitutional provision permitting the appropriation of private property for public use, contemplates an actual use by the public or the vesting of the right of such use in the public; the fact that the

> public may derive benefit, utility or advantage from the taking of land will not constitute public use within the meaning of the constitution, where it is not intended that the public shall use and enjoy the land appropriated."
>
> "3. The act authorizing cities to acquire land for parks, parkways and playgrounds, and to appropriate neighboring private property within 200 feet of the boundary line of such property so taken, and to resell such neighboring property under such restrictions in the deeds as will fully protect such parks, parkways, etc., and declaring such appropriation to be a taking for public use, is unconstitutional in so far as it authorizes cities to take and appropriate private property within 200 feet of the boundary line of property appropriated for such parks, etc., as the use to which such property so taken is intended by the act to be put is not a public use."

We call special attention to *City of Richmond* v. *Carneal* (*supra*), in which it was held:

> "1. The legislature cannot authorize an exercise of the power of eminent domain for the construction of a highway, which will include in the taking land outside the limits of the highway, to be replatted and sold.
>
> "What constitutes a public use within the power to exercise eminent domain is a judicial question."

The Court at page 393 say:

> "What is here proposed is to condemn land not needed for the street, replat it and sell it to others, presumably at a profit as no reason is assigned for the excess condemnation, except that the city council is of the opinion 'that not to acquire all, or parts of the property on certain blocks, squares or lots, through which the said proposed street will pass, would render it impracticable, without extraordinary expense, to

make proposed improvement.' The lot owners are no more concerned than other tax payers of the city with the cost of opening the street, but they have the right to insist that their property shall not be taken from them and sold at a profit, either to pay or to reduce the expense of opening the street. Such a transaction may be good financing on the city, and greatly to its benefit, but such use of public property is not a public use. 'Public use' and 'public benefit' are not synonymous terms."

And at page 398:

> "Different courts sometimes arrive at different conclusions upon the same state of facts; but, whenever the remedy is applied, it should always be because there is a direct 'public use' of the property taken, and not a mere incidental or direct public benefit."

Cooley on Constitutional Limitations, 8th ed., Vol. II, page 1129, states the matter thus:

> "The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and the due protection to the rights of private property will preclude the government from seizing it in the hands of the owners, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it."

We therefore submit, as the trial judge said, the decisions upon the subject of excess condemnation are practically uniform and one way. It has thus far met with rejection as contrary to due process.

Numerous state constitutions are said to have authorized it. In several cases they will be found to restrict the lien of the bonds issued to the land taken, as in Ohio, and as no one lends one hundred percent on land, certainly not at a jury valuation, the scheme has proved for the most part unworkable. This is the first attempt in Ohio, so far as we know, although the amendment was adopted sixteen years ago. No cases under these constitutional amendments have found their way into the libraries and we believe there are none.

A constitutional amendment in Ohio is merely the expression of a bare majority of the voters. It takes no more votes to amend the Constitution at an election than it does to amend a statute. Certainly the majority in a state can not dispense with due process. To prevent that, the Fourteenth Amendment was adopted.

7. *The question of public use is ultimately a judicial question.*

Rindge Co. v. *Los Angeles County,* 262 U. S. 700.

8. *Arbitrary and unequal classification denies the equal protection of the laws contrary to the Fourteenth Amendment.*

This condemnation attempts to recoup the cost of the improvement by taking and selling the lands of some and not of others similarly situated. If condemnation for recoupment is permissible, certainly it ought to be laid upon all lands similarly situated with regard to the anticipated benefits of the improvement.

Gast Realty Co. v. *Schneider Granite Co.,* 240 U. S. 55.

9. *The theory of remnants does not apply to the parcels in question.*

While the theory of remnants may be invoked under certain circumstances to justify the taking of more land than is actually necessary to the improvement, that is only so where the parcels remaining are so small and of so little use by themselves as to render them practically valueless. In such case the condemning and putting together several small or irregular parcels abutting on the improvement to make one lot of practical size may, perhaps, be justified. But plainly this theory does not apply here.

Again we refer to the "*Opinions of the Justices,*" in 204 Mass. at page 619, where it is said:

> "While it is plain that a city or town cannot take land outside of a public work for speculative purposes, we can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small, or of such shape and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work. But this principle is not applicable to a taking for the larger purposes stated in the question before us."

In the Richards case only one-fourth of the total property sought to be condemned is needed for the improvement; in the Reakirt case one-sixth; and in the Vester case none of the property is to be used for the improvement. Consequently these takings cannot be justified on the theory that only a remnant will be left after the improvement has been made.

OUR OPPONENTS' CITATIONS.

Of these the District Court said: (R. 32.)

> "The Court is very strongly impressed with the fact that the decisions upon the subject of excess condemnation are practically uniform and one way. * * * There are no decisions cited to the Court precisely to the contrary, all authorities cited by the defendant being in the nature of persuasive authority or argumentative development of the contentions of the defendant."

In discussing the question of public use, our opponents have brought forward the outpost cases, but have been unable to cite any case in which the taking of property for purposes of resale at a profit has been upheld by any court. In *Clark* v. *Nash*, 198 U. S. 361, there was a public purpose in the development of the entire surrounding community. The same principle seems to underlie *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527. *Old Dominion Land Co.* v. *United States*, 269 U. S. 655, was not at all a condemnation for "recoupment," as that term is used in the present record, or for the acquisition of property to be resold at a profit, but merely for the acquiring of the title to land upon which the Government had, during the war, spent a large sum of money for the construction of warehouses.

In *Hairston* v. *Danville & Western Railway Co.*, 208 U. S. 598, the highest Court of the State had already held that the condemnation was authorized by the Constitution and laws of the State and for a public use (608). This finding was held to be fully warranted by the evidence, as the proposed spur track there in question was designed to be used, not only for access to the particular factory, but for the storage of cars to be laden and unladen by receivers and shippers of freight and to relieve the congestion of business which had overburdened the trackage of the railroad; in other words, to get terminal facilities, as well as to reach the plant of the Tobacco Company.

United States v. *Gettysburg Electric Railway Company*, 160 U. S. 668, involved the right of the Government to found the Gettysburg Battle Park and condemn land for that purpose. That appropriation certainly finds no analogy to the taking of private property for speculative purposes.

In *Attorney General* v. *Williams*, 174 Mass. 476, the limitation of the height of public buildings on Copley Square bore a very distinct relation to the public interest in the use and beautification of the park.

Higginson v. *Nahant*, 11 Allen 530, upheld the condemnation of a roadway to a place of natural beauty and scenic interest, upon a basis similar to that of the last two cases.

Of these cases our opponents say, "they cannot be explained on the ground of use by the public"; but it seems to us that the Gettysburg Battle Park, the protection of Copley Square and the roadway to the point of scenic interest are all essentially for public use.

Our opponents do attempt to meet the point squarely when they say: (P. 26)

> "The recoupment of a part of the expense of the general improvement is a benefit that is entirely public in its nature. If such a result obtains, every taxpayer in the city of Cincinnati will derive a direct financial benefit over a period of many years through the decreased cost of the improvement."

This is merely an assertion that the taking, aggregation and resale of the lands of a few of the tax payers in the community will benefit the others and that such a benefit is the "public use" meant in the settled canon limiting the power of eminent domain. We think this is not so. If it is, then the taking of property for speculative purposes may constitutionally be the primary purpose of a condemnation. It would be unnecessary to hitch it on to a street improvement or other condemnation for an old-fashioned public use; it could stand independently by itself. If making profit by reselling is really a public use, it needs no other public use to sustain it.

If this condemnation were for the purpose of actually protecting or bettering the primary improvement, as by supplying light, air or view, support or drainage, another case would be presented. No such purpose is stated or claimed. But resale for revenue or even for the inducing of the construction of more handsome and costly buildings is not, we submit, in furtherance of the public use of widening a street.

If the city's contention be correct, it may by widening a street a matter of ten feet or so, take the entire block and resell it to another. Established places of business and residences may be taken at their real estate values and their owners forced to see them pass into the hands of others at public or private sale. Perhaps the former owner might repurchase. He could not decently be refused the opportunity. And if so, the net result would be to lay upon him the financial burden of any increase or profit which would go toward the cost of the improvement and thus he would bear an impost determined by no uniform rule common to others similarly situated.

The evils resulting from such a situation are not imaginary but are present in this case. The owners of the Reakirt tract desire to improve it handsomely. It is already subject to the restrictions of the building codes of the State and City and also to the zoning ordinances. The proposed structure is entirely in keeping with the location. The owner and lessees are quite willing to surrender to condemnation the twenty-five foot strip needed for the street but their title to the residue being five-sixths of the whole is now to be subjected against their will to the city's option to take it over and resell it at a profit to others who will, so far as can be seen, put it to no better purpose than that which they themselves propose. If this be possible, certainly it can no longer be said that private property is inviolate, subject only to be taken for *public use*.

Our opponents assert that the theory of the zoning cases supports excess condemnation and cite *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, and *Gorieb* v. *Fox*, 274 U. S. 603.

Those ordinances are, we submit, distinguishable as regulations of the right to use property, rigorous it is true, based upon reasonable classifications, and falling equally upon all similarly situated. Being within the police power and having relation to public health, safety, morals or general welfare, they constitute regulations of conduct in the use of property and are, of course, not in any sense a taking of the property itself; otherwise compensation would be required. They therefore bear no true analogy to the case at bar. Any restriction within the broad limits of the zoning powers can be imposed upon the respondents in the use of their property on the south side of Fifth Street. It is not of this that they complain. What they complain of is the ruthless taking of their property and selling it to somebody else.

It is now sought to justify this appropriation upon the theory that there may be some possible restrictions put upon the land when it is resold. It has been above pointed out that the Ohio statute requires that the purpose of the condemnation be specifically stated in the appropriating resolution and that no restrictions were stated therein. The use to be made of the property was left to surmise until the trial of the present case when it appeared from the evidence and statements of counsel to the satisfaction of the trial court that the purpose was "recoupment" or speculation. Certainly property can not be taken for an unascertained purpose and its use left to future determination. That is the first of the alternative grounds for this appropriation claimed in the answer. The second, the real ground, is speculation. We submit that neither is sound and that the Court of Appeals was right in so holding.

Respectfully submitted,

JOHN WELD PECK,
Attorney for Respondents.

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Supreme Court of the United States

No. 372

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
MARGARET W. VESTER,
Respondent.

No. 373

THE CITY OF CINCINNATI, a Municipal Corporation,
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vs.
JAMES S. RICHARDS and PASCHAL L. RICHARDS,
Respondents.

No. 374

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
LLEWELLYN B. REAKIRT,
Respondent.

BRIEF FOR RESPONDENTS

JOHN WELD PECK,
Attorney for Respondents.

JOHN WELD PECK,
MILTON SAYLER,
FRANK H. SHAFFER, JR.,
Of Counsel.

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BRIEF FOR RESPONDENTS

I.

STATEMENT OF THE CASE

The Attempted Appropriation

On March 21, 1928, the petitioner, the City of Cincinnati, by its council, passed the ordinance to appropriate a strip of land twenty-five (25) feet in width adjacent to the south line of Fifth Street extending eastwardly from Main Street to Pike Street, a distance of about five blocks, for the purpose of widening the street. Intersecting ways within this space are Lawson Alley, Sycamore Street, Broadway and McAllister Street. The eastern end of the strip is near the heart of the down-town district, Main Street, Sycamore Street and Broadway being avenues of first importance.

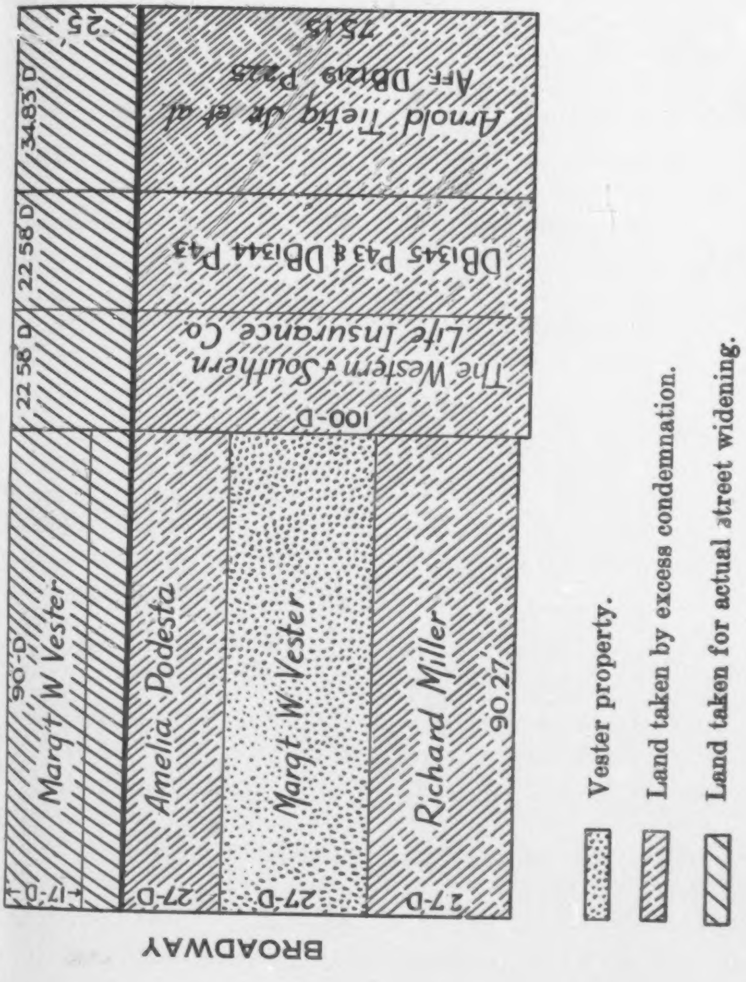
By the same ordinance the city undertook to condemn the additional areas adjacent to this strip on the south by way of "excess condemnation." *It was stated in the preliminary resolution that the same are "in excess of that actually to be occupied by said improvement."* No statement of the use to be made of these areas was set forth, the city contenting itself with the bare assertion that they were wanted "for the more complete enjoyment and preservation of the benefits to accrue from the taking of the twenty-five foot strip." But by what usage, how or why was not stated.

Repondents' Properties

Mrs. Vester's Case

The respondent, Margaret W. Vester, owns a lot on Broadway, lying 44 feet south of Fifth Street and therefore 19 feet south of the 25-foot strip desired by the city for the widening of Fifth Street. It is well improved by a good brick house of three stories, quite in keeping with the general neighborhood, an entirely lawful structure which affords no impediment whatever to the complete enjoyment and use by the city of the 25-foot strip. This house, as shown by the evidence, is occupied by Mrs. Vester's son, a physician of high standing and in active practice, a member of the staff of one of the leading hospitals, and a general practitioner and surgeon, who desires to retain his office at that place. Between Mrs. Vester's property and the 25-foot strip is the property of another physician, Dr. Joseph

Podesta. It may be stated, to avoid confusion, that Mrs. Vester also owns the corner of Fifth and Broadway which is within the 25-foot strip, where her husband conducts a drug store. *No objection is proposed by the respondent to the appropriation of that property.*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Amelia Podesta
Margt W Vester
Richard Miller
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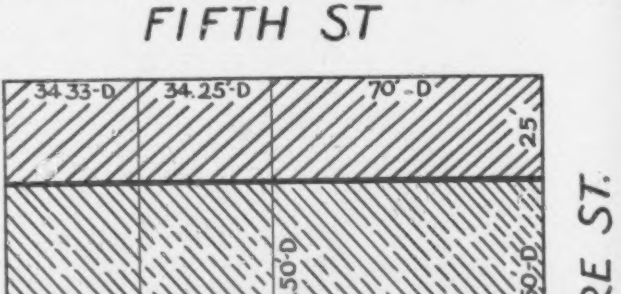
BROADWAY
Vester property.
Land taken by excess condemnation.
Land taken for actual street widening.

Mr. Reakirt's Case

Llewellyn B. Reakirt owns a vacant tract of land at the southwest corner of Fifth and Sycamore Streets. It comprises several lots, two of which are not contiguous to the 25-foot strip. This tract fronts 140 feet on the south side of Fifth Street and 150 feet on the west side of Sycamore Street. It is a very valuable piece of land, under lease and subject to a privilege of purchase which may be exercised only during the years 1955 and 1956 at $600,000.00. Owing to the pendency of the present appropriation proceedings,


FIFTH ST
34.33-D
34.25-D
70'-D
25
SYCAMORE ST.
78.50-D
78.50-D
70'-D
21.50-D
149.65'-S
Llewellyn B. Reakirt
70'-D
VACANT
50-D
50-D
34.33-D
34.25-D
70'-D

THE REAKIRT PROPERTY

▧ Land taken by excess condemnation.

▨ Land taken for actual street widening.

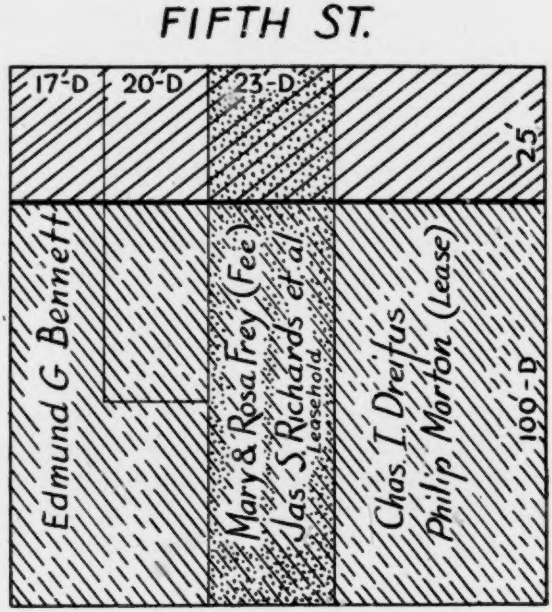
it is vacant, except that it is temporarily used as a parking lot with a small, and also temporary, wooden oil filling station near the corner.

The lessees were about to erect a handsome fifteen-story building upon this piece of property for the projected Century Athletic Club, the building to be in keeping with all that is best in the city and set back to the new proposed street line, but this improvement was blocked when the city passed the resolution to appropriate the entirety of this property as "excess." The tract is level and not needed by the city for any physical reason in connection with the widening of Fifth Street, such as sustaining a slope or for drainage or the like, and is, of course, already subject to all building laws and ordinances and zoning restrictions. The twenty-five-foot strip taken from the northern margin of this property would constitute but one-sixth of its area, the so-called "excess," or, as counsel for the city is pleased to term it, "remnant," amounting to five-sixths of the whole.

The City has never been able to point out a single reason for its attempted taking of the five-sixths, except its desire to speculate upon the value thereof which it hopes will be increased when the same is combined by force of this appropriation with other lands, likewise termed "excess," lying adjacent and to the west thereof.

The Richards Case

James Richards and Paschall Richards, brothers, own a leasehold, with privilege of purchase, upon a well-improved lot running through from Fifth Street to Buchanan Street, near Pike Street. The city proposes to take not only the front 25 feet, but the remaining 75 feet to the street in the rear as well. In this case, as well as in the Reakirt case, no objection is made to the condemnation of the 25-foot strip thereof to be used for street purposes.


FIFTH ST.
17-D
20-D
23-D
25'
Edmund G Bennett
Mary & Rosa Frey (Fee)
Jas S Richards et al
Leasehold
Chas. I. Dreifus
Philip Morton (Lease)
100-D

▩ Richards property.

▧ Land taken by excess condemnation.

▨ Land taken for actual street widening.

II.

CONDEMNATION FOR SPECULATIVE PURPOSES

Resolution Failed to State Purpose of Appropriation

We deny our opponent's affirmation that the condemnation proceedings were had in strict conformity with the laws of Ohio. On the contrary, the resolution in failing to state the *purpose* for the condemnation of the so-called excess, distinctly violated the law of Ohio.

Section 3679 is as follows:

> "Sec. 3679. *Resolution shall be passed.* When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, *defining the purpose of the appropriation,* setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. For water works purposes and for the purpose of creating reservoirs to provide for a supply of water, the council may appropriate such property as it may determine to be necessary." (Our italics.)

The city failed to define the purpose of the appropriation in its resolution declaring its intent to appropriate the property, the resolution being in substantially the same terms as the ordinance hereinabove referred to. Nor is the purpose elsewhere stated. (R. 85.)

In its present brief the city says:

> "Council does not commit itself to any particular use of the excess to be appropriated. Non constat but what, after it has the excess, it may establish small parks or open air parking places for automobiles, or it may widen Fifth Street still further. To be sure, the probabilities are that most of the excess will be resold subject to restrictions, but if so, it will be only after a finding that 'it is not needed for any municipal purpose.' "

Again the city says in its brief:

> "Obviously an impersonality such as a city cannot very well testify as to what its plans and hopes are,"

and goes on to say that any court ought to take judicial notice of at least two things in the situation presented—the elimination of old buildings mutilated by the street widening, and the immediate aggregation of small parcels of irregular shape as a desirable object in laying out the property along the newly widened highway. Neither of these objects, of course, has any possible bearing whatever upon the Reakirt and Vester properties.

It is, therefore, the city's present position that it is making a "blind" appropriation; that the city proposes to take this property without committing itself to any use, public or private, to which it may ultimately see fit to put it. We submit here that these admissions should defeat this appropriation.

Grounds of Appropriation as Stated in the District Court

The city was more frank in the District Court both in pleading and in argument. Having been charged in the bill with appropriating property for the purpose of speculation, the city's answer was as follows:

> "In conclusion the City of Cincinnati expects two things in connection with the application of the principle of excess condemnation of plaintiff's property and to other property along the south side of Fifth Street from Main Street to Pike Street, to-wit:
>
> "1st. That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage.
>
> "2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effecting the improvement."

In argument, however, the purpose of the city was even more definitely admitted, for the trial judge in his opinion (R. 28) found as follows:

> "It is frankly conceded, I think, in argument if not in the evidence, that the purpose of this excess condemnation was the recoupment, by dealing in real es-

tate, of a large portion of the heavy expense necessary for this project. So far as we have been able to analyze the evidence, this is the only motive or purpose of the excess condemnation, the only method in which such excess condemnation can, in the language of the constitution, be in furtherance of the public use. Not even slight suggestions are given to the Court as to the restrictions which shall be imposed in case of resale to preserve the improvement made, except and unless such restrictions may be considered as founded upon the intent to aggregate the numerous parcels so appropriated, or to consolidate into one ownership a multiplicity of individual ownerships."

Again (R. p. 31):

> "Certainly, the mere appropriation of excess for the purposes of resale at a profit is not in furtherance of the purpose of the municipal improvement here, which is the construction of a street or highway. Nor would any restrictions that might be imposed upon the resale of this property in any way affect or preserve the improvement of the street. In fact, the only suggested restrictions have been that the city might aggregate the separate parcels and thus restrict building in this vicinity to that of such size and nature as would improve the entire locality and benefit the community as a whole. This is not a restriction in support of or connected with or in any way preserving the improvement of Fifth Street."

And finally (R. p. 33):

> "On the whole, we are unable to believe that the only possible ground for this excess condemnation which is disclosed or even suggested in the present case, that is, the dealing in real estate for profit, bears any such close connection with the improvement or constitutes such a public use as would justify this excess condemnation."

We submit that the finding of the trial judge on this question of fact is entitled to weight.

The city must be bound by the answer which it filed to the bill, as explained by its statements to the Court on the hearing. It there disclosed that it was taking this property for the purpose of aggregating it, and reselling it under possible restrictions, thereby hoping to make the money on the resale to pay the cost of the improvement. It should not now be permitted "to mend its hold." *Railway Company v. McCarthy,* 96 U. S. 258 at p. 267.

Inequality of Selection

The city is wrong when it says in its brief that it has appropriated "the entire remnant of every parcel truncated by the widening." On the contrary, it has not been impartial in its excess condemnation but has exercised the discrimination of the speculator, which in this instance it is, selecting what it thinks it can sell at a profit when it has aggregated the holdings of the respondents and others. Thus, the property adjacent on the west to Mr. Reakirt's property is taken only to the depth of one hundred feet, but his, being perhaps the most valuable vacant tract in the heart of the city at this time, is taken to its full depth of one hundred and fifty feet.

The house known as the John Van Range Company building, owned but not used by the Cincinnati Masonic Temple Company, available for long lease, and displaying a sign that it will be remodeled to suit tenants, fronts on Fifth Street and runs southwardly one hundred feet along Broadway just opposite Mrs. Vester's property. Only the front portion of this building to a depth of twenty-five feet is taken. The remainder is to be left in its present ownership—a flagrant instance of partiality—as Mrs. Vester is asked to surrender her property on Broadway, directly opposite. Indeed, as far as the physical situation is concerned, the

John Van Range Company building is in precisely the same situation as the Richards property.

The excess condemnation area has not been extended to the property lying on the north side of Fifth Street, which, of course, is equally contiguous to the improvement and equally affected by the widening. The "recoupment" is laid entirely upon selected parcels on the south side of Fifth Street; we say "selected" because the Masonic Temple property, the Fontbonne Building and the John Van Range building are omitted from the operation of the excess condemnation. The owners of the Fontbonne and Masonic Temple have not donated the twenty-five-foot strip; they are to be compensated for the same although they have already set their buildings on the new line. The owner and lessees of the Reakirt property were ready and willing to set back their Century Athletic Club building to the widened street line and retain the residue of their property, but this privilege, although extended to the owners of the property above named, was denied to them. Thus it will be seen that this excess condemnation, besides being for a non-public use, as we contend, is not made to operate equally upon all of the properties similarly situated.

The Proceedings in the Court of Common Pleas

In Ohio, a municipal condemnation case, as distinguished from one brought by a railroad company or similar corporation, is merely an appraisal in which neither an answer denying the right of condemnation nor a cross-petition is permissible. The only remedy if the city has exceeded its powers and appropriated without right, is an independent and separate action for an injunction. This is firmly established. *P. C. C. and St. L. R. R.* v. *Greenville,* 69 O. S. 487; *Sargent* v. *City of Cincinnati,* 110 O. S. 444; *State* v. *Eastman,* 118 O. S. 121.

In the first of these cases the court held that there was no provision by which the railway company (whose property was being appropriated by the City of Greenville) had a right to file an answer to the application.

> "Nor is there any authority for filing a cross-petition by the railway company setting up the unnecessary interference with its property. No provision is made for the making or trial of such an issue, and the court is without authority to render a judgment upon such issue if made." (pp. 496, 497.)

This passage was quoted, re-affirmed and applied in the second case above cited (pp. 453-454), and in the last case it was held that even a writ of prohibition would not lie to restrain an unwarranted appropriation, the court saying:

> "The proposition that injunction will lie to prevent an unwarranted or unauthorized proceeding in appropriation has been conclusively determined by the decisions of this court." (p. 128.)

It was therefore impossible for the respondents to protect themselves by answer or cross-petition in the appropriation proceedings begun in the state court and they were driven to recourse to the present proceedings.

III.

THE SCOPE OF THE CASE

This case does not involve the validity of excess condemnation in its full scope and breadth or as applied for other purposes and under other circumstances. Certainly the Reakirt and Vester cases do not involve in the slightest degree the theory of small remnants of irregular shape and size, nor odd pieces of real estate; the only phase of excess condemnation that has up to this time ever found the least sanction in any court in the United States thus far found or cited. The present issue does not involve excess condemnation for the protection of public buildings or similar improvements. It involves only ***excess condemnation for recoupment or profit.***

This subject is dealt with in Chapter 4 of Cushman on "Excess Condemnation" cited by our opponents. That author follows with a chapter entitled, "Financial Gains and Risks of Excess Condemnation," which indicates the character of the present undertaking.

As to the constitutionality of the project the same author speculates upon the outcome of such a case as this in the following language:

> "In the light of these facts it seems fair to assume that the judgment of the Supreme Court upon the constitutionality of excess condemnation will depend upon the purpose for which that policy is used. If the only motive for the application of that scheme was to secure to the city treasury the profit which might accrue from the resale of the surplus land taken it could probably be argued with much cogency that the financial need of the city did not constitute a public purpose of the kind which would justify the condemnation of the land of particular citizens, and that the use of eminent domain for that purpose was a denial of the equal protection of the laws and a deprivation of property without due process of law."

It is evident, therefore, that the courts below are not alone in finding a difference between the present attempted application of excess condemnation and other uses to which the power might more appropriately be put.

The Legislature of Ohio, even before the adoption of the present excess condemnation amendment had conferred upon municipalities (Section 3677-12) the right to condemn excess property for the protection of buildings and their environs, to preserve the view, appearance, light, air and usefulness of public grounds occupied by such buildings and esplanades and parkways leading thereto. With these desirable objects of excess condemnation we have no quarrel.

Change of Base

The petition now abandons the statement of objects for this appropriation as set forth in the answer, and brings forth a list of five alleged objects now, for the first time and without any support in the evidence, said to have been considered by the Council in passing this ordinance:

1. Damage to residue would equal the value of the same.
2. Provision against temporary unsightly uses such as patched buildings, or bill boards.
3. The aggregating of lots for business space.
4. The development in harmony with the widened street.
5. The development on the south side of the street would hasten the development on the north.

There is here a scrupulous avoidance of the original avowed purpose of *resale for profit.*

Our opponents cite three justifications, not for this particular application, but for excess condemnation generally:

1. The avoidance of remnants;
2. The preservation and amplification of the improvement; and
3. The recoupment of expense.

The first two have on this record no application to this case, and the scope of the real, genuine question here involved is whether the city can take the respondents' properties which are unnecessary to, and in two of the instances, disassociated from the actual improvement, for the purpose of reselling the same to other private individuals at a profit.

IV

ARGUMENT

Due Process of Law

We do not deem it necessary to join issue with our opponents upon their attempted definition of due process of law. We ground our case upon the proposition as already established and settled, that an appropriation for a non-public use contravenes the Fourteenth Amendment, the constitutional right to due process, and to the equal protection of the laws. For this we rely upon the following statements of law from *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239 at pp. 251, 252:

> "There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or State, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments. *Loan Association* v. *Topeka,* 20 Wall. 655; *Cole* v. *La Grange,* 113 U. S. 1, 6. If the purpose be public the taking may be outright, provided reasonable, certain and adequate provision is made, at the time of the appropriation, to ascertain and secure the compensation to be made to the owner. *Cherokee Nation* v. *Southern Kansas Railway Co.,* 135 U. S. 641, 659; *Sweet* v. *Rechel,* 159 U. S. 380, 399; *Western Union Tel. Co.* v. *Pennsylvania R. R. Co., et al.,* 195 U. S. 540. Any state enactment in violation of these principles is inconsistent with the due process of law prescribed by the Fourteenth Amendment. *C. B. and Q. R. R. Co.* v. *Chicago,* 166 U. S. 226; *San Diego Land, etc., Co.* v. *National City,* 174 U. S. 739, 754; *Smyth* v. *Ames,* 169 U. S. 466, 525. * * * "

Also: *Fallbrook* v. *Bradley,* 164 U. S. 112 at p. 158.

Lewis on "Eminent Domain," 3rd ed., Section 315, says:

> "The Fourteenth Amendment forbids any state to deprive a person of his property without due process of law. To take property for other than a public purpose, either under the guise of taxation or of eminent domain, is to violate this provision."

McQuillan on "Municipal Corporations," 2nd ed (1928), Section 1600, reviews the subject as follows:

> "Only a few of the state constitutions in terms prohibit the taking of private property for private use. All courts, however, agree that this cannot be done. Different courts find different reasons for this conclusion, some putting it on the ground of an implied prohibition in the eminent domain provision of the constitution, some on the ground that it would be contrary to the provision that no person shall be deprived of his property except by the law of the land, others on the ground that it would be subversive of the fundamental principles of free government or contrary to the spirit of the constitution. * * *
>
> * * * * * * * *
>
> "The use is not public where the benefit to the municipality is merely incidental and purely prospective. Likewise, property cannot be condemned to obtain the possible income or profit that might inure to the municipality from the ownership or control of it."

It is, of course, immaterial that such condemnation for a non-public use may be attempted under apparent authority of a state constitution, but it is interesting to note that such a conflict of state and federal constitution over such an attempted appropriation actually occurred in *In re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781 (1900).

And, of course, the Fourteenth Amendment protects against actions by municipal corporations acting under power conferred by the State. *C. B. and Q. Ry. Co.* v. *Chi-*

cago, 166 U. S. 226; *The Home Telegraph and Telephone Company* v. *Los Angeles*, 227 U. S. 278, Syl. 5.

And, to clear the way for the main argument, we further submit that Section 266—Judicial Code—denying the right of injunction to stay proceedings in a state court, does not apply here because it is not sought to enjoin proceedings in the state court but the appropriation itself, which is primarily by the ordinance of the city council, consummated by appraisal, payment and possession, and also because the proceedings in the state court are repugnant to the Constitution of the United States. *Wells-Fargo* v. *Taylor*, 254 U. S. 175, 183; *Smith* v. *Apple*, 264 U. S. 274, 279, 280.

The Present Condemnation is a Taking for a Non-public Use and Unconstitutional

It has been so held of similar attempts by every court of this country before which this question has ever come. It is true that this is the first time that the matter has been presented in a Federal court. The principle, however, that excess condemnation constitutes a taking for a non-public use and contravenes the right to due process of law and the fundamental rights of property has been declared and adjudged by the highest courts of Massachusetts, New York, ~~North~~ Carolina, Pennsylvania and Virginia, while the Court of Appeals of Maryland accorded an excess condemnation statute an interpretation so limited as to bring it within the constitutional limitations for which we contend.

The earliest case seems to have been that of

Dunn v. The City Council of Charleston (1824), Harper's Law Report, 189,

in which the court said concerning a statute attempting to confer that power upon the city:

> "To take the property of one man, and give it to another, would be contrary to all those immutable

> principles of justice and common law, which have been consecrated by universal consent from time immemorial, and which are secured to us by the plain and unequivocal language of the Constitution. Such would be the effect of the act in question."

In the State of New York the matter first arose in

In re The Albany Street Extension, 11 Wendell 148 (1834),

in which case it was held as follows:

> "The Corporation of New York have not power to take more of the lands of individuals than is actually required for a street, and that portion of the act relating to the City of New York, which authorizes the commissioners of estimate and assessments to include in their assessment the *whole* of a lot, when *part* only is required for the use of a street, by means whereof the fee becomes vested in the corporation upon confirmation of the report of the commissioners, is *unconstitutional and void,* when such lands are taken without the consent of the owner."

Here the City of New York attempted to take a strip off of Trinity Church yard in addition to that necessary for the purpose of widening Albany Street. The Court, at page 152, referring to the statute, say:

> "If this provision was intended merely to give to the corporation capacity to take property under such circumstances with the consent of the owner, and then dispose of the same, there can be no objection to it; but if it is to be taken literally, that the Commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, and the residue to be applied to private use, it assumes a power which, with all respect, the legislature did not possess. The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the use of an-

other. It is in violation of natural right, and if it is not in violation of the letter of the Constitution, it is of its spirit, and cannot be supported. * * *"

The foregoing case was approved and followed in

Embury v. Conner, 3 N. Y. 511 in 1850.

In 1863 the matter gave rise to the decision in the leading case in New York of

Bennett v. Boyle, 40 Barbour 551.

The opinion is sufficiently indicated by the following two paragraphs of the syllabus:

> "1. The law of eminent domain extends to lands needed for public use and no further. Private property may be taken by the state and the title of the owners divested for this purpose and for no other."
>
> "2. Where a statute authorizes the land of individuals to be taken for the purpose of widening an avenue in a city, the powers and jurisdiction of the commissioners are limited and restrained to the lines of the avenue as enlarged. Beyond and outside those lines they can exert no power or authority whatever."

In Massachusetts the General Assembly in 1910 requested of the Supreme Court its opinion as to the constitutionality of a statute involving excess condemnation.

Opinions of the Justices, 204 Mass. 607.

In answering this question in the negative the court said:

> "The legislature cannot authorize a city to exercise the right of eminent domain in connection with the laying out of a public thoroughfare by taking land adjoining but outside the proposed thoroughfare with a view to its subsequent use by private individuals under conveyances, leases or agreements, although such use is intended to promote trade and perhaps also manufacturing by the erection of suitable buildings on the land, the purpose not being a public one within the meaning of the constitution of the Commonwealth."

At page 610 the court say:

> "* * * The only question about which there is a possibility of a doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that a use of the property to obtain the possible income or profit that might inure to the city from the ownership and control of it would not be a public use. The city cannot be authorized to take the property of a private owner for such a purpose, nor can the city tax its inhabitants to obtain the money for such a use. It could as well tax them to raise money to carry on any other private business with a hope of gain. Such proceedings are entirely outside of the functions of a State or any subdivision of a State.
>
> "It is equally true and indubitable that a management and use of such property to promote the interests of merchants or traders who might occupy it, and to furnish better facilities for doing business and making profits, would not be a public but a private use."

And again on submission of a similar question by the legislature it was held in

Opinion of the Justices, 204 Mass. 616,

that:

> "1. It is not within the power of the Legislature, in connection with the widening of a highway or the laying-out of a new highway in the city of Boston, to authorize that city to take by right of eminent domain real estate in excess of those parcels which in whole or in part are necessary for the highway itself, with a view to the subsequent sale by the city of such excess of real estate at its full value subject to conditions or restrictions designed to promote the commercial and industrial welfare or growth of the municipality by insuring an opportunity for the construction along such highway of buildings adapted to the requirements of commerce, trade and industry and especially to the requirements of those forms of business which to a large extent employ teaming, thereby relieving

> or helping to prevent the increase of congestion of traffic and so facilitating the transportation of freight and passengers through the section of the city in which such highway is widened or laid out."

Court at page 618 say:

> "The suggestion is that the city, by right of eminent domain, take land outside the highway and pay for it with money raised by taxation. Seemingly, the predominant, if not the only purpose of doing this is to sell the land afterwards to individuals for use in the construction of buildings adapted to modern requirements of commerce, trade and industry. The city might or might not sell the land at a price above its cost, and in this way derive a pecuniary advantage, presumably the use of the land and buildings by individuals would increase their business and bring them prosperity, and thereby promote the growth of the city and the interests of the public. Such a result might be expected from a variety of other successful enterprises in different kinds of business. The use of money to promote such an enterprise is not a public use, within the meaning of the law, but a use bringing benefit to the public only indirectly, through the activity and success of individuals. Under our constitution money cannot be raised by taxation for such a purpose."

The only possible exception to the unbroken line of authority is the suggestion (not adjudication) that remnants of lots, so small and irregular as to be virtually useless may perhaps be included in the primary condemnation. This has no application to the properties here in question. Upon this subject, in the opinion from which we have just quoted, the Justices said:

> "While it is plain that a city or town cannot take land outside of a public work for speculative purposes, we can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small,

> or of such shape and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work. But this principle is not applicable to a taking for the larger purposes stated in the question before us." (p. 619.)

In the Richards case only one-fourth of the total property sought to be condemned is needed for the improvement; in the Reakirt case one-sixth; and in the Vester case none of the property is to be used directly for the improvement. Consequently this taking cannot be justified on the theory that only a remnant will be left after the improvement has been made.

In Pennsylvania the question squarely arose in the year 1913, in

Pennsylvania Mutual Life Insurance Company v. Philadelphia, 242 Pa. St. 47

and it was there held that:

> "1. The constitutional provision permitting the appropriation of private property for public use, contemplates an actual use by the public or the vesting of the right to such use in the public; the fact that the public may derive benefit, utility or advantage from the taking of land will not constitute public use within the meaning of the constitution, where it is not intended that the public shall use and enjoy the land appropriated."
>
> "3. The act authorizing cities to acquire land for parks, parkways and playgrounds, and to appropriate neighboring private property within 200 feet of the boundary line of such property so taken, and to resell such neighboring property under such restrictions in the deeds as will fully protect such parks, parkways, etc., and declaring such appropriation to be a taking for public use, is unconstitutional in so far as it au-

> thorizes cities to take and appropriate private property within 200 feet of the boundary line of property appropriated for such parks, etc., as the use to which such property so taken is intended by the act to be put is not a public use."

In Virginia the same question was similarly dealt with in

City of Richmond v. Carneal, 129 Va. 388, 14 A. L. R. 1341 (1921).

We quote from the syllabus and the opinion as follows:

> "1. The legislature cannot authorize an exercise of the power of eminent domain for the construction of a highway, which will include in the taking land outside the limits of the highway, to be replatted and sold.
>
> "What constitutes a public use within the power to exercise eminent domain is a judicial question."

The Court at page 393 say:

> "What is here proposed is to condemn land not needed for the street, replat it and sell it to others, presumably at a profit as no reason is assigned for the excess condemnation, except that the city council is of the opinion 'that not to acquire all, or parts of the property on certain blocks, squares or lots, through which the said proposed street will pass, would render it impracticable, without extraordinary expense, to make proposed improvement.' The lot owners are no more concerned than other taxpayers of the city with the cost of opening the street, but they have the right to insist that their property shall not be taken from them and sold at a profit, either to pay or to reduce the expense of opening the street. Such a transaction may be good financing on the part of the city, and greatly to its benefit, but such use of public property is not a public use. 'Public use' and 'public benefit' are not synonymous terms."

And at page 398:

> "Different courts sometimes arrive at different conclusions upon the same state of facts; but, whenever the remedy is applied, it should always be because there is a direct 'public use' of the property taken, and not a mere incidental or direct public benefit."

In Maryland in the case of

Duke Bond v. The Mayor and City Council of Baltimore, et al., 116 Maryland 683,

the Court of Appeals limited the operation of what was apparently an excess condemnation statute to the taking of the land actually necessary to the improvement in hand and avoided an interpretation which would have made it unconstitutional without passing upon the question specifically.

Naturally the text writers have taken the same view of the situation.

Cooley on "Constitutional Limitations," 8th ed., vol. 2, p. 1129, says:

> "The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and the due protection to the rights of private property will preclude the government from seizing it in the hands of the owners, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it."

Nichols on "Eminent Domain," 2nd ed., vol. 1, page 179, speaking of excess condemnation in London and other Europeon cities, says:

> "Such an enterprise, although sanctioned in countries in which the power of the legislature is not restricted by a written constitution, involves the taking

> of the property of one person and the sale of it to another for his own private use and, until recently at least, was impossible on account of the provisions of the state constitutions. Recently, however, there have been amendments adopted to some of the state constitutions designed to permit the taking of property for just such purposes, but it cannot be confidently stated that such improvements can now be effected until it has been determined whether a taking for such a purpose would not be a violation of the Fourteenth Amendment."

But of the question here in hand the same author has the following to say:

> "* * * Construing such a statute as limited in its application to trifling and almost negligible remnants which would be unsuitable for private use after the part actually needed for public use had been appropriated, it would probably be sustained in some jurisdictions at least as authorizing a taking for a purpose reasonably incidental to the laying out of public ways; *but if the proposed taking savored at all of a municipal land speculation, no court would hesitate to hold it unconstitutional.*" (p. 178.) (Italics ours.)

Writing upon this subject in his monograph on excess condemnation, Professor Cushman of the University of Illinois says:

> "Whether or not excess condemnation can be regarded as a justifiable measure of social control will depend in large measure upon the purpose for which it is employed. Certain it is, that the taking of surplus property in order to eradicate the evil of remnants of land, or in order to protect the beauty and usefulness of a public improvement, can be defended upon somewhat different principles from those which support the use of the scheme for the single purpose of making money for the city." (p. 11.)
>
> "While the property of every citizen may be taxed for the purpose of securing public revenue, it has

never yet been suggested, in this country, that an empty treasury could justify the public authorities in depriving a man of his property by right of eminent domain." (p. 15.)

State Constitutions Cannot Surmount the Fourteenth Amendment

Our opponents call attention to amendments of the constitutions of several states, including Ohio, purporting to authorize excess condemnation to a greater or less extent.

The very necessity of adopting these state amendments is a strong admission that excess condemnation theretofore contravened their respective bills of rights. But certainly the Fourteenth Amendment is just as potent to protect the citizen against the taking of his property by the state without due process of law, as was the former constitution of any of these states. It is quite apparent that under such circumstances the state would have two barriers to surmount: its own fundamental law and the Constitution of the United States; and while a majority of the voters of Ohio had power to amend the constitution of this State, certainly their attempt was ineffectual to deprive the present respondents of their right to rely upon the guarantees of due process and equal protection contained in the Fourteenth Amendment.

Upon a similar subject the Supreme Court of Ohio, in *State* v. *Ferris*, 53 O. S. 314 said that the first section of the Fourteenth Amendment with reference to the equal protection of the laws is not broader than the second section of the bill of rights of the constitution of Ohio. The converse is quite as true. Therefore the constitutional rights of the respondents to due process and equal protection as against state and municipal action, are in no respects affected or lessened by the amendment of the state constitution.

We contend for an interpretation of the Ohio constitution that will bring it into consonance with the Fourteenth Amendment. *Madisonville Traction Co.* v. *St. Bernard Mining Co., supra; C. B. and Q. Ry. Co.* v. *Chicago, supra.*

It is argued that the judgment below overrides the constitution of a state. It does not. It merely confines its operation within the limits of the highest law. The real question is whether the attempted application of the Ohio constitution would override the Constitution of the United States.

No Answer to Say that Respondents Will be Fully Paid

Our opponents in their brief urge that this property is to be taken only after appraisal by a jury and the payment of the award, and argue that, inasmuch as the respondents will thus receive value for their property, they are accorded due process. *We answer that even a fair assessment can not justify a taking for a non-public use and that no amount of procedure, under those circumstances, can amount to due process and equal protection.*

In this respect we call attention to: *Chicago, Burlington and Quincy Railroad Company* v. *Chicago,* 166 U. S. 226 at pp. 234, 235:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant

having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank,* 92 U. S. 542, 554; *Leeper* v. *Texas,* 139 U. S. 462, 468. But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' " *Davidson* v. *New Orleans,* 96 U. S. 97, 102.

The Question of Public Use is Ultimately a Judicial Question

Whether the taking in question in any given case is for a public or a non-public use must necessarily depend upon the facts in that case and the problem is not answered by the fact that the voters of the state adopted a law or amendment that might be construed so broadly as to cover the use proposed. On the contrary, the question in each case is ultimately a judicial question. *Rindge Co.* v. *Los Angeles County,* 262 U. S. 700; *Sears* v. *City of Akron,* 246 U. S. 242.

Arbitrary and Unequal Classification Denies Equal Protection of the Laws

This condemnation attempts, in the language of our opponents, to "recoup" the cost of the improvement by taking and selling the lands of some of the neighbors, but not of others similarly situated. If condemnation for "recoupment'' is permissible, certainly it ought to be laid upon the lands of all similarly situated.

The term ''recoupment'' is the English phrase covering the making of profit by excess condemnation, which was not originally intended by the Land Clauses Consolidation Act of 1845 in which it was said to have its origin. Cushman, in his work on ''Excess Condemnation'' above referred to, says:

> ''What we, in America, term 'excess condemnation for the purpose of making money,' the Englishman describes by the one word 'recoupment.' '' (p. 157.)

The English act named attempted to preserve in a measure the rights of the land owner by providing that the authorities, when finally ready to sell the surplus lands, *were required to offer them first to the persons who originally owned them.* Inasmuch as there seems to have been no authorization for, or practice of levying municipal assessments, the Metropolitan Board of London had recourse to excess condemnation and resale as a method of attempting to secure recoupment of the cost of the improvement, with, however, very poor success, and the proposition of adopting the American system of special assessments has been a matter, according to the same author, of lively discussion.

It will thus appear that this proposition of ''recoupment,'' as it is put in England, or speculation upon the abutters' land, as we put it, is merely a plan to lay hold of the property of the abutting land owner, improve its frontage, and capture for the benefit of the public treasury any increment in value that may occur by selling it back to the former owner or to someone else. In this aspect it is, and indeed it has been in England regarded as, roughly, the equivalent of our special assessment.

In the instant case the lands of some abutters are subjected to this assessment, or capture of increment, and the lands of others are not. For instance, between the land of the respondent Reakirt and the land of the respondent Vester lies an entire block of property comprising the Masonic Temple building and the John Van Range Co. building which are entirely exempted by favor from the application of this principle of recoupment. The property on the north side of the street, which will benefit equally with that upon the south side of the street, is also exempted. The scheme, therefore, which our opponents justify in their brief as a recapture by the city of an increment of value conferred upon adjacent property by the making of this improvement, does not bear equally upon all similarly situated, but is definitely, substantially and grossly unequal, and in this respect also seems to us to deny the respondents the equal protection of the laws. It certainly does so as a matter of fact.

We contend that, in its essence, the unequal burden laid upon the respondents here is no different from that enjoined in *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55.

Excess Condemnation in Other Cities.

The brief of the city devotes much space to alleged uses of excess condemnation elsewhere—pages 26 to 41. Three plats are reproduced as representing several instances of such uses by the City of Rochester; also a plat of Kingsway, London, is set forth. These are no part of the record in the present case. They are substantiated by no evidence. We have not had the means of inquiring into the particular circumstances of the appropriation of these lands. We suspect that the Rochester instances would have been found, had they been brought forward in proof by witnesses, subject to cross-examination, to have been mere purchases under the form of appropriation and the result of voluntary bargain and sale between the city and the land owner.

There seems to be no report of any case growing out of these condemnations or of any resistance thereto on the part of the owners. We can only assume acquiescence or voluntary co-operation.

The appendix to the brief filed by the *amicus curiae* on behalf of New York brings forward some pictures and plats not in the evidence, supposed to show the evils resulting from the ancient and time honored method of taking what is needed. These are also no part of the record in this case and seem to us to have little or no bearing upon the constitutional rights of the parties hereto.

Both counsel draw largely upon the writings of enthusiasts for excess condemnation in substantiation of their arguments. These go, in large part, beyond the record of the present case and into the general question of the value of excess condemnation as applied under any and all circumstances. We, on the contrary, endeavor to restrict ourselves to the instant case. We here claim no more than that the property of Llewellyn B. Reakirt is being ruthlessly taken for the mere purpose of speculation and for no other purpose whatsoever; that Mrs. Vester's property is no "remnant" and is being taken for the same reason; and that while one-fourth of the Richards property is desired by the city for legitimate purposes, the other three-fourths is neither unusable nor unsaleable in the hands of the owners who wish to retain it; that it is not a "remnant" and is also condemned, on the record here presented, for the mere purpose of resale for profit.

The fact that our opponents stress the generalities, foreign illustrations, plats, and pictures not in evidence rather than the actual record, seems to indicate a desire on their part to avoid the specific issues presented.

It is significant that the amicus curiae who presents the brief on behalf of New York finds no warrant whatever for the excess appropriation of Mr. Reakirt's property, and, *refrains from any attempt to justify the appropriation thereof on the ground of "recoupment" or speculation or any other ground.*

The history of excess condemnation in the United States is rather flaunted. When examined, however, that history will be found to reveal nothing more than a number of statute and constitutional amendments purporting to grant the power to a greater or less degree, a very few instances of the attempted application thereof, *and a uniform and unbroken line of judicial decisions upholding the right of the property owner against these attempts to take his land and sell it to somebody else.*

Foreign Illustrations

Our opponents refer to historical uses of excess condemnation abroad, among others to the Boulevard Haussmann in Paris. The right of excess condemnation was there virtually farmed out to the contractor, for whose use and at whose expense the city condemned, he having the privilege of building the boulevards and selling upon this speculation the lands thus acquired for him under the right of eminent domain by the City of Paris. (Cushman, pp. 149-150.)

It is certainly hard to conceive of such a scheme as within the limits of the constitutional rights of citizens of the United States. That a street contractor should be given the right to condemn and speculate upon an area of land as his recompense for building a street, seems to us to offer a good illustration of the evils against which the fundamental rights that we invoke should protect.

As may be expected, the Boulevard Haussmann as a financial venture was not a success. Excess condemnation seems to have been abandoned in Paris. (Id., p. 152.)

The same scheme was tried in Brussels with the result "that the city went to the verge of bankruptcy with a debt of some $50,000,000. It still held title in 1904 to some four hundred buildings which it rented, and for which it had paid about $6,400,000, perhaps a million dollars more than it could get from the sale of them." (Id., pp. 154-155.)

This, of course, is no legal reason for denying the right of excess condemnation, but we offer it in answer to our opponent's suggestion that the scheme is good morals and good business, and also to illustrate that it is highly speculative.

Foreign countries seem not to have universally approved the legality of this scheme, for we find the assertion that it has been held unconstitutional in the Republic of Switzerland and also in the Argentine Republic in a foot note, which we do not have the means at hand of verifying, in Professor Cushman's book, page 275, as follows:

> "Professor W. F. Dodd states that the power of excess condemnation has been held unconstitutional in Switzerland. (Entscheidungen des Schweizerischen Bundesgerichts, Vol. 31 [1905], Part 1, p. 645); and Argentina (Fallos de la Suprema Corte, Vol. 33 [1888], p. 162.) Cited in article on "Political Safeguards and Judicial Guaranties," Columbia Law Review, Vol. xv, p. 306, note."

Could Land Speculation be the Primary Object of an Appropriation?

Our opponents argue that "public use" means not use by the public of the land to be appropriated but is synonymous with "public benefit," and that the laying of lands under condemnation for the capture of the increment in value is a public benefit and therefore valid. They argue here that if they need twenty-five feet off the edge of Mr. Reakirt's property they have the right to take the other 125 feet in depth. There is, of course, no reason why they should stop there. If their theory be sound they are entitled to go to any limit or embrace any property which they conceive may afford a probable opportunity for the realization of profit. If this right of excess condemnation can be based upon an appropriation along the margin of twenty-five feet, it may similarly be based upon the taking for actual use of ten or five feet or of one foot, or perhaps six inches or less. Thus any street widening exposes the owner of the adjacent property, no matter how valuable to him as an established business stand or as a home, to the danger of its being taken upon appraisal by the jury and resold to another.

The question arises, why the necessity of taking any part at all for actual use? If condemnation for speculation for the enrichment of the public treasury by dealing in real estate be a public use, it is not necessary to attach it to any other public use. It would seem that as a public use it must stand upon its own bottom, or fall altogether.

Cushman says:

> "But on the other hand if the city may condemn land in excess solely because it needs the money which it hopes to make from the resale of the land, where, it may well be asked, is the land which the city may not properly take for such a purpose?" (p. 15.)

The present land speculation, the taking of Mrs. Vester's property, which is disassociated and removed from the area of the actual improvement, is certainly in no just sense incident to the primary condemnation; and the same may be said of the taking of the residue of Mr. Reakirt's property, of which only a small margin is desired.

Speculation in Fact

Under the laws of Ohio after the jury shall have set its award upon the property of the respondents, if allowed to proceed with this condemnation the city will have until judgment is entered confirming the same and six months thereafter in which to determine whether or not it will accept the property at the valuation placed upon it by the jury. It has this right as to each parcel thereof separately and severally. Thus the city will acquire for a space of six months and as much longer as the entry of the judgment may be delayed, an option upon respondents' properties at the award made. The city has evidently had this in mind, for in appropriating this property it has described the twenty-five-foot strip and the excess as *separate parcels,* so that it will gain the right to take the one and leave the other if it so desires. Thus it will obtain the refusal of the excess of respondents' property at a figure separate from that placed upon the twenty-five-foot strip.

General Code Section 3697 is as follows:

> "Section 3697. *Neglect to pay or take possession in six months; attorney's fees.* When a municipal corporation makes an appropriation of property, and fails to pay or take possession thereof, within six months after the assessment of compensation shall have been made, its right to make such appropriation on the terms of the assessment so made shall cease and determine, and lands so appropriated shall be relieved from all incumbrance on account of any of the proceedings in such case, and the judgment or order of the court directing such assessment to be paid shall cease to be of any effect, except as to the costs adjudged against the corporation. Upon motion of any defendant, such costs may be retaxed, and a reasonable attorney's fee paid to the attorney of such defendant, which, together with any other proper expenses incurred by the defendant, may be included in the costs."

While such owner is entitled to a reasonable attorney's fee and costs in the event of abandonment, there is no provision for compensation for the holding of his property under option until the verdict is confirmed by the court, and for six months thereafter until relinquished, in the event the city is not satisfied with the valuation placed thereon and decides not to take. The land owner must meantime stand helplessly by while the city, with nothing to lose, gambles with his property taken as "excess for resale." This seems to us to be nothing short of a flagrant case of the taking of property without due process of law.

It is not even provided that the former owner shall have the first opportunity to purchase, or the refusal of the property at its offered price in the event of a resale. That was the practice in the English attempts to substitute excess condemnation for special assessment, and is also provided in the Rhode Island amendment. The least semblance of common justice would seem to require it. The proposition of the City of Cincinnati is, on the contrary, that on the pretext of the slightest street widening, one man's place of business may be taken as a "remnant" and sold to his rival by sealed proposals, or in any other way that the statute may permit. It need not even be a "remnant," but may, on the city's theory, be property adjoining a remnant, or even property which adjoins property which adjoins a remnant. In short, under the Ohio law as contended for, the power of eminent domain includes whatever a city desires to take as "excess."

It is also the law of Ohio that the rights of the city are not exhausted by the abandonment of an assessment, but the city may thereafter appropriate and secure a re-assessment. *Trustees of the Cincinnati Southern Railway* v. *Haas*, 42 O. S. 239.

It is apparent that during this interval of option there would be a period of active endeavor to dispose of the excess so acquired by the city.

This activity of the city would be accentuated by the fact that the record shows that the city has no available funds with which to pay for this excess that it now seeks to condemn, and therefore would first have to sell to Peter to pay Paul, so to speak.

The total fund available to the city for the improvement is $1,600,000. The estimate for the twenty-five-foot strip is $2,000,000, without paving. The stated cost of the excess is from $3,500,000 to $5,000,000 (R. 81). The city cannot pay for the excess lands by the issuance of bonds because the only bonds which can be issued under the constitutional provision in question (Article XVIII, Section 10, Ohio Constitution) are bonds secured merely by a lien upon the property condemned and are not general obligations of the city, either as to principal or interest, and therefore, of course, unsalable, as nobody will lend one hundred percent upon a jury's valuation without any recourse whatever against the city.

The city therefore has no available fund for this excess condemnation and the only way it could accomplish its object would be by a resale within the period of its aforesaid six months' option. If the award proved too high for the market the city would, of course, dismiss the case at its costs, paying counsel fees, and either condemn again or drop the affair altogether. It seems intolerable that a property owner should be subjected to such a state of affairs.

That the value of the adjacent property will be in any way enhanced by the widening of the street is a pure assumption on the part of our opponents, based upon nothing definite. City street widening is common in these days of automobile traffic congestion. This widening is primarily to afford a broader and swifter path for motor vehicles. There is no real reason to assume that any benefit whatever will be conferred upon the adjacent lands. The probabilities are to the contrary. It is well known that narrow down-town streets are frequently the most important and property abutting thereon the most valuable. The case continues, in every aspect, to be a mere speculation.

Our Opponent's Citations

Our opponents have brought forth the outpost cases, those in which the right of eminent domain has been pushed to its utmost limitations, but have been unable to cite any case in which the taking of property primarily for the purpose of resale at a profit has been upheld by any court.

Clark v. *Nash*, 198 U. S. 361, involved the right of Nash to condemn a right of way for a ditch across the property of Clark for the purpose of bringing water to Nash's land for irrigation purposes from a mountain stream known as Fort Canyon Creek. Plaintiff claimed to be entitled by law to the use of a certain amount of the flow of the waters of that creek, under the laws of the State of Utah, and to have no other way of getting the same to his land except by the enlargement of a certain ditch that seems to have already existed, from the creek, and the purpose of his suit seems to have been to widen the ditch about one foot. The damages were assessed at $40.00.

The court confined the opinion to the particular case, holding that upon the facts stated in the findings of the court the use was a public one; that other land owners adjacent might share in the use of the water by taking the same proceedings; that it was not necessary that all should join in one proceeding, or that a water company should be formed; and that the rights of a riparian owner in and to the use of water flowing by his land are not the same in the arid and mountainous states of the west as they are in the states of the east.

This was a case of the enlargement of an already existing way of necessity from land to the only available supply of water. The distribution of water supply is, broadly speaking, a well recognized public function. The case is, therefore, entirely different from one in which the object is resale for profit.

This case, however, carries with it the following reservation:

> "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."

Strickley v. *Highland Boy Gold Mining Company,* 200 U. S. 527 is in principle much the same. The condemnation was for an aerial bucket line across a placer mining claim, brought by a mining corporation which enjoyed the right of eminent domain under the laws of Utah. This court said:

> "If, as seems to be assumed in the brief for the defendant in error, the finding that the plaintiff is a carrier for itself and others means that the line is dedicated to carrying for whatever portion of the public may desire to use it, the foundation of the argument on the other side disappears."

Speaking of *Clark* v. *Nash, supra,* the opinion says:

> "While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent."

There is nothing in the present case which indicates that the foundations of the public welfare of Cincinnati require that Mrs. Vester should concede her house and lot to the city at an appraised value merely that it may be aggregated with other properties and resold for profit, or perhaps turned back to her after more than a six months' delay, upon the city's being unable to resell at a profit. Certainly there is no fundamental necessity that justifies the city in taking five-sixths of Mr. Reakirt's lot when only one-sixth is needed or desired for the actual purpose of street widening. We think the same is true of the Richards property.

In *Old Dominion Land Co.* v. *United States,* 269 U. S. 55, the Government condemned land which it had held under lease during the late war for military purposes and upon which it had put structures costing more than a million and a half dollars. The land was valued at $129,000 by a jury. The Government had thirty days after the expiration of the lease to remove the buildings and had offered to purchase the property, but the offer being refused, the condemnation was instituted within thirty days and before the time for removal had run out. Congress had specifically appropriated money for the acquisition of this land. When the proceedings were begun the buildings belonged to the United States and this court said it would not be just to allow the delay necessary in legal proceedings to deny the United States rights it had and endeavored by this suit to assert. It was further held that the declaration of Congress that the purpose was a public use was not overcome by anything in the evidence, and that its decision was entitled to deference until it was shown to involve an impossibility.

There were, however, certain military purposes mentioned in the Act of Congress and the court said:

> "But the military purposes mentioned at least may have been entertained and they clearly were for a public use."

In that case the Government desired to remove the buildings and the buildings were a part of the land. The buildings had cost the Government the large sum mentioned. To condemn land for the purpose of removing a part of it is, of course, common practice—for instance, borrow pits for railroads. We see nothing but a strictly public use of the land itself in the purpose of the Government to remove therefrom the buildings which it had built.

It is therefore submitted that there is no analogy whatever to the present case.

In *Hairston* v. *Danville and Western Railway Company*, 208 U. S. 598, the railway company was condemning for a spur track which it alleged to be needed for the transaction of its business, *for the accommodation of the public generally*, and for the purpose of reaching the factories of a tobacco company. It was shown that this track would greatly enlarge the team track facilities of the railroad; that five hundred feet of the proposed track was level and would be used entirely for the public and would store sixteen or eighteen team track cars for the general public. The court, on page 608, said that it is unnecessary to consider whether a condemnation by a railroad, authorized by the state and approved by a state court, of land for the construction of a spur track to be used solely to transport commodities to the main line and thence to the place of sale and consumption throughout the country, is a violation of the Fourteenth Amendment; nor the authorities bearing upon the question whether such is a public use.

> "Here the proposed spur track can be used, and was designed to be used, not only for access to the factory of the tobacco company but for the storage of cars to be laden or unladen by receivers and shippers of freight, and to relieve the congestion of business which, through the growth of the town, overburdened the limited trackage of the railroad. * * *
>
> "This testimony describes a use which is clearly public."

The Hairston case, therefore, presented the question not of an exclusively private, but of a partly public railway siding or spur, and the upholding of the appropriation there made, we submit, has not the slightest tendency to sustain the efforts of the city to take the lands of the respondents for the purpose shown in this case.

United States v. *Gettysburg Electric Railway Company*, 160 U. S. 668, involved the right of the Government to found the Gettysburg Battle Park and condemn land for that purpose. That appropriation certainly finds no analogy to the taking of private property for speculative purposes.

Mt. Vernon-Woodberry Cotton Duck Company v. *Alabama Interstate Power Company*, 240 U. S. 30, was an appropriation of land and water rights for the purpose of making, supplying and selling to the public, power produced by water as a motive force; that is, to supply a general, fundamental and public need. The land itself was to be used for the public. Here no use is proposed to be made of the lands of respondents. The public, so far as appears, are not to physically enjoy the possession of the lands as a park or the like, nor are they to receive anything produced thereon. The distinction seems very apparent.

Head v. *Amoskeag Manufacturing Company*, 113 U. S. 9, is, of course, the leading mill-site case. The court, at page 21, say:

> "We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature.
>
> "When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified."

Our opponents cite *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112. We also rely upon the same case. In this case, so far as the question of public use was concerned, the fundamental question was whether a general irrigation district for the irrigation of the arid lands of all owners within the district was a use of that description, so as to sustain the validity of an assessment laid against the land of one of the proprietors. It does not seem to reach the instant case. If we were attempting to resist an assessment for the laying of water mains through the respondents' lands to serve them and the public generally, the question would be parallel. But we are not. Mr. Reakirt and his lessees wish to hold their land so that they may improve it according to the building laws and the building code and the zoning ordinances of the city, and their own tastes, ambitions and desires, and not to be compelled to surrender it to the city to resell to someone else to improve according to his desires, with, of course, an intermediate profit to the city. The same is true as to the other respondents.

Not one of these cases sustains the condemnation of real estate for the purpose of resale. No judicial authority in this country can be brought forward substantiating such a project. The outpost cases which our opponents have cited fall far short of embracing the principle for which the city contends.

Zoning Ordinances are Exercise of Police Power and Do Not Apply

Our opponents bring forward the cases sustaining the zoning ordinances and say that in a very real sense the ordinary excess condemnation undertaking is a zoning enterprise on an equitable basis. In *Euclid* v. *Ambler Realty Company,* 272 U. S. 365 and *Gorieb* v. *Fox,* 274 U. S. 603 the ordinances are sustained as an exercise of the police power, with substantial relation to the public health, morals, and general welfare. They involve in no way the exercise of the power of eminent domain; on the contrary, they sustain the right to regulate the use of municipal areas without the making of compensation. The properties of the respondents are already subject to all of the building and zoning laws of the state and city, and if further regulation is the purpose of the city, within reasonable limits, all that is necessary is for the city to enact the same by ordinance. Certainly it is no reason to condemn the respondents' property to say that the same may be constitutionally subjected to zoning ordinances and similar regulations.

The Opinions of the Lower Courts

Remnants

It is argued that unusable and unsaleable remnants may be taken; that, therefore, it is within the power of the city to define remnants, and that a lot may be made a remnant by calling it such, and that having once created a "remnant" *eo nomine* the city may go as far as it likes in the condemnation of contiguous lands, and of lands contiguous to contiguous lands, indefinitely, to add to such remnant in order to produce what it may conceive to be a plot of ground of sufficient size for resale for the development of the neighborhood in accordance with its ideas.

This seems to us merely to prove that when the unwarranted invasion of property rights is once begun there is no limit. We submit that the inviolability of property, except when needed for a genuine public use, is of vastly more importance than the convenience of municipalities in the claimed power to take from one and sell to another to an indefinite extent on the pretext that occasionally ~~a~~ an owner~~s~~ may be left with a small and oddly shaped lot.

The opinion of the United States District Court for the Southern District of Ohio, by Judge Hickenlooper, will be found in the record at page 26, and is based, of course, upon a first-hand hearing of the evidence and the statements of counsel. The opinion of the Circuit Court of Appeals, by Judge Moorman, is at page 103 of the record and is to be found reported in 33 Fed. 2nd at page 242.

With regard to the so-called "remnants" theory the court said:

> "The remnants theory, as technically considered, is not applicable to the property here involved. No part of the Vester property is included in the 25-foot strip. Only one-sixth of the Reakirt property is included therein, and the remaining five-sixths is sufficiently large for appropriate building sites for that section of the city. Similarly, what is left of the Richards property, three-fourths, would be valuable and utilizable for purposes suitable to the location of the property. Thus in one case no part of the property is to be occupied by the street, and in each of the others there will be enough left to meet the needs of suitable buildings for that vicinity. Consequently, in none of them can it be said that in assessing damages to the owner the jury would be justified in taking as its criterion the value of the entire tract. It ought not to be held, we think, that, because there would be unusable portions of other adjacent lots, the city should have the right to take property that is usable merely to join it with those unusable remnants in order to sell them advantageously."

The theory of remnants is much stressed by the proponents of excess condemnation and may be stretched so as to cover a multitude of sins. In the City of Paris, to which our opponents are fond of referring, very large remnants of land, some of them five thousand feet in area, were condemned by the city.

> "These remnants were resold for building lots, and in some cases the remnant, which had been taken as being too small to allow the erection of a wholesome building thereon, was divided into two lots, each of

which was sold by itself for a building lot." Cushman, p. 55.

The so-called remnant of Mr. Reakirt's property is 17,500 square feet, or more than one-third of an acre of land, rectangular in shape, a vacant lot, fronting on two main thoroughfares in the heart of the City of Cincinnati.

Mrs. Vester's property, if remnant at all, is all remnant, because the city takes no part of it.

The so-called remnant of the Richards property is seventy-five percent of the entirety with frontage upon two streets.

We submit that both of the lower courts were right in determining that the remnant theory had no proper application to the present case.

"Recoupment"

Under the heading "Recoupment of Expense" in our opponent's brief it is admitted that the City of Cincinnati is practically entering the real estate business by appropriating, among others, the lands of the respondents and attempting to realize a profit therefrom with which to pay for the land appropriated and also the cost of the street, sewer, water and other improvements. They justify this action by saying that in most cases the general taxpayers pay the greater portion of the cost, being aided only by special assessments. Our answer is that not only is the abutting property benefited, but many square miles of territory in the outlying districts will be brought that much nearer to the center of the city by the widened and improved highway and the value of this land will be indirectly increased. Let the city, therefore, proceed in the constitutional way of making assessments according to benefits upon the lands in question and other abutting property, and charge the balance to the general taxpayer who will receive by far the greater benefit from the improvement.

CONCLUSION

We submit that the record under consideration presents an attempt to take the property of the respondents for mere speculative purposes. As to the Reakirt tract, no other purpose is even suggested. As to the Vester property, it shows an attempt to reach out beyond the bounds of the improvement and acquire an independent and unrelated property also for purposes of speculation. As to the Richards property, the city needs but one-fourth and has attempted to designate the remaining three-fourths a "remnant," a misnomer.

The real effort of the city is to pay for an improvement by speculating in some of the adjacent property.

We submit that this is in contravention of the Fourteenth Amendment to the Constitution of the United States, and that the courts below were right in protecting the respondents against this usurpation of power by the writ of injunction.

Respectfully submitted,

John Weld Peck,
Attorney for Respondents.

John Weld Peck,
Milton Sayler,
Frank H. Shaffer, Jr.,
Of Counsel.

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Supreme Court of the United States

No. 372

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
MARGARET W. VESTER,
Respondent.

No. 373

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
JAMES S. RICHARDS and PASCHAL L. RICHARDS,
Respondents.

No. 374

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,
vs.
LLEWELLYN B. REAKIRT,
Respondent.

REPLY OF RESPONDENTS TO BRIEF OF GILBERT BETTMAN, ATTORNEY GENERAL OF OHIO, AMICUS CURIAE.

JOHN WELD PECK,
Attorney for Respondents.

JOHN WELD PECK,
MILTON SAYLER,
FRANK H. SHAFFER, JR.,
Of Counsel.

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Pursuant to leave granted at the time the brief of Mr. Bettman as *amicus curiae* was allowed by the Court to be filed, after the argument had begun, the following is presented in answer thereto.

The *amicus curiae* says, page 7:

> "It is this readjustment of property lines, together with restrictions where appropriate, that constitutes the public purpose which is the justification of the taking in furtherance of the improvement."

The several counsel who have filed briefs on behalf of the city or as *amici curiae* take different grounds as to the object and purpose of this condemnation. This is the natural result of the failure of the city to follow the plain provisions of Section 3679 by which it was required to *define* in its condemning resolution the *purpose* of the appropriation. (For statute, see our original brief, page 7.)

The Attorney General now suggests two public purposes, (1) the readjustment of property lines in the vicinity of the improvement; and (2) restrictions where appropriate; and says that these are "in furtherance of the improvement."

READJUSTMENT OF LOT LINES.

The readjustment of property lines is, we submit, in no wise in furtherance of the street widening, saving and excepting, of course, the taking of the actual twenty-five feet needed for that purpose. It may be in furtherance of a plan to secure the building of a larger and more handsome house on Mrs. Vester's property or on that of Mr. Richards, to take it over and resell it with other parcels to someone else, but it certainly is not in furtherance of the widening of Fifth Street. Mr. Reakirt's property will be no more handsomely improved as a result of the taking. Its location, extent and value insure a handsome improvement. But even a betterment of its prospects of improvement would not be a furtherance of the street widening.

The amendment to the Constitution of Ohio says a municipality appropriating for public use may take excess property "in furtherance of such public use." The Constitution does not say that it may take excess lands for general public benefit, and, we submit, that the rule of strict construction in dealing with language granting the right of *eminent domain* applies.

Furthermore, the language of the resolution and ordinance will be searched in vain for any declaration that the city is taking over this property for the purpose of readjusting the lot lines. Therefore we say the readjustment of lot lines is not within the purview of the Constitution of the state or of the city legislation.

RESTRICTIONS.

As a subordinate purpose the *amicus curiae* puts in: "together with restrictions where appropriate." We again invoke the statute under which this appropriation pretends to proceed. Council did not say in its resolution or ordinance that this property was taken for the purpose of restricting its future use or occupancy in any manner whatsoever. This it has not done, probably for the reason that, as a step in furtherance of the improvement, the physical situation does not permit of it. The street is simply to be widened from sixty-six to ninety-one feet, an object fully accomplished by the adding of twenty-five feet.

If an additional burden or assessment on the adjacent land, as for slope or fill, or light and air, or drainage, or for any other definite purpose, was desired, it could have been very readily specified. On the other hand, had Council specified an intention to restrict the excess, when resold, to the occupancy of buildings, to cost not less, for instance, than a million dollars and to cover not less than say, ten thousand square feet of ground each, such restrictions would not have been in furtherance of the very simple purpose specified as the primary public use. The city, however, failed to specify any use whatever, in clear violation of the enabling act, and condemned for an undisclosed purpose, and counsel now seek conjectural purposes for support.

It is to be remembered that this property is already subject to all reasonable restrictions that may be imposed under the police power; building regulations, zoning laws, housing regulations, including the right to regulate height, set-back, open areas and character of usage. Any further restriction would tend to reduce the price on resale. Beyond the police power, for *actual* public uses lies the power of eminent domain, under which could have been taken any easement that might have been specified in furtherance of the primary use. But when all reasonable police regulations have been laid upon the land, and when the municipality has taken by eminent domain all the *definitely specified* easements that it may require for the public use, it would seem that, except for the power of taxation, what remains of the title is the inviolable private property of the owner, and that it ought not be taken from him for no specified purpose, on the vague and indefinite assertion that its taking may be for the public benefit in some way thereafter to be determined. The trial judge found not even the slightest suggestion of the nature of the restrictions to be imposed, unless restriction lay in the mere aggregation of parcels. (R. 29.)

Therefore, if the readjustment of lot lines be rejected as not in furtherance of the primary use, and if the subject of restrictions be rejected for want of substance, or for lack of specification, as required by statute, there remains no purpose for this condemnation except that of recoupment or resale for profit, which is its real object.

It is not, as the *amicus curiae* assumes, sought in these cases to enjoin the general application of the Ohio amendment for excess condemnation. The decree of the court below is directed only against the attempted taking of these three pieces of property under the particular circumstances of the record. As this Court has pointed out in *Euclid* v. *Ambler,* so frequently cited by both sides, a general enactment may be valid and the particular applications attempted under it invalid.

We submit that the purpose of justice in this case can be served by confining the amendment to its appropriate application, in accordance with its terms, viz., "in furtherance of such public use," and that the power to take property for other than public use ought not, in the language of Mr. Justice Storey in the case of *Wilkinson* v. *Leland,* 2 Peters 627, be found to lurk under any general grant of legislative authority or be implied from any general expressions of the will of the people.

Respectfully submitted,

JOHN WELD PECK,
Attorney for Respondents.

JOHN WELD PECK,
MILTON SAYLER,
FRANK H. SHAFFER, JR.,
Of Counsel.

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Nos. 372, 373.

IN THE

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OCTOBER TERM, 1929.

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MARGARET W. VESTER.

THE CITY OF CINCINNATI, Petitioner,

vs.

JAMES S. RICHARDS, *et al.*

(On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, to Review Its Decision Reported at 33 Fed. 2nd 242.)

Motion of the People of the State of New York for Leave to File Brief as Amicus Curiae, and Brief of Amicus Curiae.

HAMILTON WARD,
Attorney General of the State of New York.

HENRY S. MANLEY,
Assistant Attorney General.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Nos. 372, 373.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

THE CITY OF CINCINNATI, Petitioner,
vs.
MARGARET W. VESTER (No. 372; also vs. RICHARDS,
No. 373).

Motion for Leave to File Brief as Amicus Curiae.

May it please the Court:

The undersigned, as counsel for the People of the State of New York, respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as *amicus curiæ.*

HAMILTON WARD,
Attorney General of the State of New York,

HENRY S. MANLEY,
Assistant Attorney General,
Counsel for the State, as Amicus Curiæ.

Nos. 372, 373.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

THE CITY OF CINCINNATI, Petitioner,

vs.

MARGARET W. VESTER (No. 372; also vs. RICHARDS, No. 373).

BRIEF ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK, AMICUS CURIAE.

Preliminary Statement.

OPINION BELOW.

The opinion of the District Court (R. 26-33) is not reported, so far as we know. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 103-108) is reported in 33 F. (2nd) 242. Certiorari was granted by this court on October 21, 1929.

INTEREST OF THE STATE.

The courts below have held that "excess condemnation," as involved in these cases under the supposed authority of the Constitution of Ohio, is a taking of property without due process in violation of the 14th amendment to the Federal Constitution. The Constitution of the State of New York contains a provision intended to authorize such acts of "excess condemnation" as are involved in the Vester and Richards cases, at least. Because of these facts, the State of New York deems itself interested in establishing that the opinions below are erroneous.

Constitution of Ohio, Art. XVIII, Sec. 10.

> "*Appropriation in Excess of Public Use.* A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

Constitution of New York, Art. I, Sec. 7, 2nd Par.

> "The Legislature may authorize cities and counties to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased."

Facts.

In 1927 the City of Cincinnati took certain steps towards the widening of Fifth Street, between Main Street and Pike Street. This section is near the heart of the city, and Fifth Street at this part carries a large amount of eastbound traffic. The streeet was then 66 feet wide, and it was proposed to add 25 feet on the south side of the street for the six blocks in question (R. 84, par. 4). There is no question as to the power of the city to take that 25-foot strip.

Incidentally to that street widening, the City attempted the three excess condemnations now in question, together with others which apparently have not been challenged. The facts as to each of these three appear to be as follows:

RICHARDS PROPERTY.

On the south side of Fifth Street, in the three blocks in which the challenged excess condemnations arise, the buildings are mostly old, and the individual frontages small (R. 19, 84, par. 6). In the block in which the Richards property is found, Fifth Street is paralleled at a distance of 100 feet from its south line by Buchanan Street. After taking the 25-foot strip there will be left a block about 300 feet long composed of narrow individual properties only 75 feet deep. The Richards property is one of those, 23 feet wide, running through from Fifth Street to Buchanan Street (R. 40, 44, 87). On the Richards property is an apartment house, age unknown, containing five apartments renting for a total of $176 per month (R. 14). The value of the property is $28,000 or more, the 25-foot strip to be taken is worth $15,000 or more, and the remnant will be worth, "in excess of its present value," apparently meaning in excess of $13,000 (R. 18, 20, 24). The answer says this house is two stories, "very old," and built to the street property line, so that taking the front 25 feet will destroy the entire building (R. 47). The answer also asserts that the 23 by 75 lot left after the street widening, "will be incapable of suitable development by itself to produce reasonable income on its market value" (R. 47), and there is some testimony that the street widening would naturally result in aggregating of parcels (R. 20), which supports the assertion of the answer. The properties on either side of the Richards property for the entire block are being subjected to excess condemnation, making up the strip 75 feet deep and about 300 feet long, bounded on the west by Lawrence St., north by the widened Fifth St., east by Pike St., and south by Buchanan St.

VESTER PROPERTY.

The excess condemnation which includes the Vester property takes in about 75 feet in depth from the widened Fifth Street, making a slight jog in order to follow the lot lines at the rear. It takes in the frontage on Fifth Street of a complete block, but only 170.46 feet long. Apparently it includes remnants of three small lots, besides the Vester lot and an identical lot immediately south from it (R. 87). The Vester lot has 27 feet frontage on the east side of Broadway, and runs back 90 feet parallel with Fifth Street, only 19 feet south of the proposed south line of Fifth Street (R. 1, 9). On the Vester property is a three-story building apparently fifty or sixty years old (R. 18). It is a residence building, and the lower floor is occupied by a physician's office (R. 12). The answer says that after the widening of Fifth Street the 19-foot strip north of the Vester property, "will be incapable of development by itself as a suitable lot for the erection of a building worthy of the corner it will occupy," and that the Vester building, even before the widening, is "incapable of producing a reasonable income on its present market value" (R. 9). There appears to be no direct evidence supporting these allegations, but indirectly they are supported by the testimony as to location, size, present value of $46,600 or more for the Vester property (R. 18), and probable aggregating of parcels (R. 20).

REAKIRT PROPERTY.

The Reakirt property is rectangular, with a frontage of 138.81 feet on Fifth Street and 149.67 feet on Sycamore Street. It is worth upwards of $500,000, perhaps much more than that (R. 19, 24, 75). It is unimproved except by a filling station, apparently regarded as a "taxpayer" rather than a permanent structure (R. 15). In 1925, after the widening of Fifth Street was anticipated, but apparently without any anticipation of excess condemnation, the property was leased for 99 years, the lessee being obligated to build a commercial building not less than three stories in height and costing not less than $250,000 (R. 77). It is proposed to take the whole by excess condemnation; also an equal depth for the remainder of the block, which extends about 100 feet west from the Reakirt property. This block is taken to a depth of about 125 feet in excess of the proposed widening, whereas the other blocks affected east and west from it are taken to a depth of only about 75 feet. There is no allegation in the answer that the Reakirt property, or any adjoining property, will be so small after the street widening as to be incapable of suitable development to produce reasonable income on its market value, or in accordance with the character of the neighborhood. On the contrary, there is an express admission in the answer that the Reakirt property is, "available for the building of a high-class office building" (R. 62). See also testimony to similar effect (R. 15-16) and the lease (R. 74-80).

PURPOSE OF EXCESS CONDEMNATION.

The bills of complaint assert that each of the proposed excess condemnations is:

> "* * * a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made, and said property is taken for the purpose and with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated." (R. 3, 41, 57.)

This allegation is denied in each answer (R. 7, 45, 62) and the purpose of the excess condemnation is alleged by the city in various terms, which appear to be accurately summed up by the concluding allegation of each answer, as follows:

> "In conclusion the City of Cincinnati expects two things in connection with the application of the principle of excess condemnation to plaintiff's property and to other property along the south side of Fifth street from Main street to Pike street, to wit:
>
> 1st. That the city will be able to further the appropriate development of the south side of Fifth street, between Main and Pike streets by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage.
>
> 2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effectuating the improvement." (R. 10, 48, 64-65.)

The Resolution of the City Council of July 6, 1927, commences:

> "Declaring the intention to appropriate property for street-widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement." (R. 85.)

It concludes:

> "That [the] Council hereby declares that the appropriation of said excess property described in Section 2 hereof is in furtherance of the said widening of Fifth Street as described in Section 1 hereof, and is necessary for the complete enjoyment and preservation of said public use." (R. 87.)

The Ordinance of March 21, 1928, commences with a recital similar to that quoted first above, and in introducing a description of the lands subjected to excess condemnation, says:

> "That, in pursuance of the public use set forth in Section 1 hereof [street widening] and for a more complete enjoyment and preservation of the benefits to accrue from said public use, the following described property be, and the same hereby is, appropriated in excess of the property described in Section 1 hereof:" (R. 89-90.)

Nothing further appears as to the purpose or motive of excess condemnation, except that each answer says the city is operating under the Constitution of Ohio, Art. XVIII, Sec. 10 (R. 9, 47, 63).

SUMMARY OF ARGUMENT.

Point I. Excess condemnation upon the remnant theory is an outgrowth of actual experience.

" II. Taking unusable remnants, and no more, is not an appropriate remedy. Taking unusable remnants, plus enough more to make them usable, is the appropriate course.

" III. The requirement of due process does not forbid taking unusable remnants plus enough more to make them usable.

" IV. The Richards and Vester cases represent appropriate applications of excess condemnation upon the remnant theory. The decisions below in those cases should be reversed.

POINT I.

Excess condemnation upon the remnant theory is an outgrowth of actual experience.

"The life of the law has not been logic; it has been experience." We have to determine whether certain uses of excess condemnation have such a relation to public welfare as affords them social justification. We are directly concerned with, "the felt necessities of the time," which, "have had a good deal more to do than the syllogism in determining the rules by which men should be governed." "Upon this point a page of history is worth a volume of logic."[*]

To evaluate the force of experience behind the principle of excess condemnation, it is necessary to examine its history in some completeness. That history is to be found in statutes, decisions, and texts. We believe the importance of the question justifies the method, and the bulk, of the matter separately bound as an Appendix to this brief.

Reviewing the past, which alone gives to the few words of constitution and statute their meaning and significance, we note that before 1900 there was some legislative fumbling with the problems related to excess condemnation. Those statutes were various in terms, isolated, and relatively insignificant. Some court decisions of that period denied the constitutionality of excess condemnation, even for taking the smallest remnant.[*]

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[*] The quotations are, of course, from O. W. Holmes, Jr., "The Common Law", page 1; also from Mr. Justice Holmes, in New York Trust Co. v. Eisner, 256 U. S. 345, 349.

Only since 1900, and especially since the Massachusetts report of 1904, has there been a significant and general turning to excess condemnation. Too forceful to be discouraged by a Massachusetts advisory opinion in 1910 that nothing could be taken except unusable remnants, and by other adverse decisions in Maryland in 1911, in Pennsylvania in 1913, and in Virginia in 1921, the principle has established itself in the constitutions of eight states. This chronology may be indicated as follows:

1904 Massachusetts report, and statute (App. 3-4, 24-29). Ohio statute (App. 6-7).
1905 Philippine Island statute (App. 8).
1906 Maryland and Virginia statutes (App. 9, 11).
1907 Connecticut statute (App. 10).
1908 Maryland statute (App. 9).
1909 Wisconsin statutes (App. 15). Proposed broad constitutional amendment in N. Y. failed of passage (App. 20-21).
1910 Maryland statute (App. 9.) Massachusetts advisory opinion against excess condemnation (App. 5-6).
1911 Massachusetts constitution amended (App. 6. Various statutes under that authority, 1912 to 1928, are listed in a footnote). Wisconsin statute (App. 15-16). Proposed broad amendment defeated by pop-

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[*] An Appendix to the Brief, etc., pages 1-3. Hereinafter references to the appendix will read merely "App.", followed by the page number.

ular vote in New York (App. 21). Maryland adverse decision (App. 9-10).

1912 Ohio and Wisconsin constitutions amended (App. 7, 16). Articles by Warren, Munro, Binkerd; resolution of N. Y. Mayors (App. 30, 33, 35-36).

1913 New York constitution amended (App. 21. Various statutes under that authority, 1915-1929, footnote App. 22). Oregon statute (App. 15). Pennsylvania adverse decision (App. 13-14). Report to Mayor N. Y. City (App. 36-37).

1915 Pennsylvania constitutional amendment passed but never submitted (App. 14-15). Article by Williams; report by Swan (App. 38-42).

1916 Rhode Island constitution amended (App. 17). Article by Swan; texts by Shurtleff and Robinson (App. 42-43).

1917 Text by Cushman (App. 43-44).

1918 Pamphlet by Chicago Bureau of Public Efficiency (App. 45). Review in 1919 by Swan (App. 45-46).

1920 Illinois constitutional amendments proposed (App. 18).

1921 Oregon statute amended (App. 15). Virginia adverse decision (App. 12).

1923 Pamphlet by Purdy (App. 46).

1925 Article by Williams and others (App. 46-47).

1927 New York constitutional amendment extended to counties (App. 21). Illinois statute relative to Chicago (App. 18).

1928 Michigan, California and Virginia constitutions amended (App. 19-20, 12).

1929 Adverse decision in federal court relative to Ohio constitution (App. 7-8). Constitutional question presented in two New York litigations (App. 22-23).

POINT II.

Taking unusable remnants, and no more, is not an appropriate remedy. Taking unusable remnants, plus enough more to make them usable, is the appropriate course.

The experience set forth in the literature of excess condemnation, with many concrete illustrations,* shows that following the widening of a street, or any similar public improvement, particularly in the business section of a city, the "equilibrium" of lots is adversely disturbed. The passage of years has tended to fix their size and shape to that most efficient under the particular conditions. All this is injuriously affected by the change in property lines.

Under the ordinary policy of *laissez faire*, it frequently will happen that years will pass after the improvement before the interests of the remnant owner and the rear or adjoining owner will be brought into harmony and their properties united. Until that event, the property will be unsightly and unprofitable.

This is not bare theory, but the dear teaching of experience. This was a fact attested before the legislature of New York State, by maps and photographs, when it approved the constitutional amendment of 1913 (App. 48 and following). Herbert S. Swan referred to visible illustrations of his point, in New York, Philadelphia and Chicago, before he summed up one aspect of the public interest, in his question:

> "Were it not better that the erstwhile village streets should choke with metropolitan traffic than that the appearance of the city should be forever marred

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* App. 24-27, 34, 35-37, 39, 40, 45, 46, 47; also the maps and photographs.

> and ruined as a result of improvements executed without regard to the replottage of contiguous and neighboring land?" (App. 46.)

Merely taking the remnant does not touch the real problem. Nothing effective is accomplished by holding remnants by the city in "innocuous desuetude." And if they be sold, at public auction, the city will ordinarily gain in immediate money, but in nothing else. Baltimore tried that experiment; the power to sell remnants, under the Burnt District law:

> "* * * was used in at least one case and a remnant almost unusable alone was bought by a speculator at public auction and used in a manner calculated to extort blackmail from the owner next in the rear."*

Massachusetts became conscious of that defect in its Remnant Act of 1904, according to Mr. Swan:

> "As the power to take remnants without the power to take sufficient land to form suitable building lots would have been of small use in planning improvements, the statute was never utilized."*

We are aware that the Massachusetts advisory opinion *(Opinion of Justices,* 204 Mass. 607, also 616; App. 5-6) squarely holds that unusable remnants may be taken, but no more.

That opinion is a suicide. The power denied destroys the power conceded. Not only does it destroy its effectiveness in practice, but also its basis of reason, because the power to take what is needed to make remnants useful is a logical implication from the only principles which justify taking remnants at all.

The public purpose is to lay out a street. Any incident must be justified by some appropriate relation to that purpose. The purpose is aided upon the financial side, only, if the taking be restricted to unusable remnants.

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* Flavel Shurtleff, "Carrying out the City Plan" (1916) page 118, note.
* "Excess Condemnation" (1915) page 57.

The Massachusetts court seems to have been troubled by that fact, while not clearly confessing it. The court said:

> "We can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small, or of such shape, and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work." (204 Mass. 620; App. 6.)

The court may have felt that a concession as to the unusable remnant was forced upon it by *Dorgan v. City of Boston* (94 Mass. 223; App. 3), and by six years sufferance of the Remnant Act. For whatever reason, it said that unusable remnants might be taken, and referred to *"economy," "utility," "or some other public interest."*

The first reference is easy to understand; but why the principle of "economy" can justify the taking of an unneeded and unusable remnant, and must stop short there, rests upon the *ipse dixit* of the court. How "utility" is served by taking the unusable remnant, and cannot be served by joining enough with it to make it usable, is far from clear. And then, least clear of all, that mysterious reference to "some other public interest." Can this be a hint at municipal æsthetics? The reference was either completely meaningless, or else too full of meaning to fit the limits of the occasion.

In our view, the taking of the unusable remnants, plus enough more to make them usable, is readily justifiable, if we first accept it as an experienced fact that the free processes of trade will not accomplish that end.

The end is an appropriate object of governmental activity. The sovereign may open a street, and should do it in an efficient and economical manner, remembering that streets serve the public use in other ways than bearing through traffic, and that public health and convenience and civic beauty are, at least since 1903*, as appropriate matters of public concern as direct utility. The laying out of streets is an appropriate exercise of state sovereignty, just as certain fiscal operations are an appropriate exercise of national sovereignty; the choice of means to be employed involves a broad legislative discretion. *McCullough v. Maryland,* 4 Wheaton 316.

That there must be limitations upon the legislative discretion, and the scope of the argument for it, is conceded. It is the policy of our society to protect individual rights, and merge them no more than necessary in the rights of government. But our argument now goes no further than that the government should be permitted to act in a matter very nearly related to conceded functions of government, and where individualism is helpless.

We submit that the same public use or interest which justifies the taking of unusable remnants, with stronger reason justifies the taking with them of adjoining land, making in all, *"no more than sufficient to form suitable building sites abutting on such street."* (Quotation from N. Y. Constitution, *ante,* page 3.)

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* Williams v. Parker, 188 U. S. 491; Cusack Co. v. Chicago, 242 U. S. 526; Rindge Co. v. Los Angeles, 262 U. S. 700; Euclid v. Ambler R. Co., 272 U. S. 365.

POINT III.

The requirement of due process does not forbid taking unusable remnants plus enough more to make them usable.

The older state decisions, holding that not even unusable remnants can be condemned,* may be disregarded. Nobody believes them to be law today.

The Pennsylvania and Virginia decisions (*Penna. Mutl. Life Ins. Co. v. Phila.*, 242 Pa. 47; *Richmond v. Carneal*, 129 Va. 338) may rest upon their peculiar facts, unrelated to any justification for excess condemnation (See App. 12-14).

The Massachusetts decision which we have already discussed, and the decisions below in the present case, rest upon a lack of understanding and sympathy with the remnant motive for excess condemnation.

The constitutions of eight states now declare that excess condemnation is or may be a taking for a public purpose. This is a judicial question, but we believe this court is free to accept the declaration as a correct statement of fact. It has usually accepted such declarations:

Williams v. Parker, 188 U. S. 491.
Clark v. Nash, 198 U. S. 361.
Strickly v. Highland Bay, 200 U. S. 527.
Jones v. Portland, 245 U. S. 217.
Green v. Frazier, 253 U. S. 233.
Joslin Co. v. Providence, 262 U. S. 668.
Milheim v. Moffatt Tunnel, 262 U. S. 710.

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* Dunn v. Charleston, Harper's Rep. 189; Matter of Albany St., 11 Wend. 149; Embury v. Connor, 3 N. Y. 511; Bennett v. Boyle, 40 Barbour 551; Bond v. Mayor, etc., 116 Md. 683.

We anticipate that this court will concede to the states the same latitude of method it concedes to the federal government. That will be ample for present purposes.

Brown v. United States, 263 U. S. 78.
Old Dominion Land Co. v. U. S., 269 U. S. 55.
Highland v. Russell Car Co., 279 U. S. 253.

POINT IV.

The Richards and Vester cases represent appropriate applications of excess condemnation upon the remnant theory. The decisions below in those cases should be reversed.

The Richards case involves a remnant, 75 feet deep and 23 wide, running through from street to street. Probably the state of pleadings and record justify accepting the allegation of the answer that the remnant, "will be incapable of suitable development by itself to produce reasonable income on its market value," and hence that aggregation of parcels must precede any erection of permanent improvements. The properties on either side are being taken with it, and will be available for aggregation by act of the city.

The Vester case differs from the other, only in that the Vester property is not itself a remnant, but is needed for aggregation with a remnant. Like the Richards property, the Vester property has its obvious future in aggregation, and owes its value to that possibility, if we may rely upon the answer (Compare, R. 9-10, and 20).

We do not find anything in the record, or in "common knowledge," which justifies the following statements of the Circuit Court:

> "The remnants theory, as technically considered, is not applicable to the property here involved. * * * What is left of the Richards property, three-fourths, would be valuable and utilizable for purposes suitable to the location of the property." (R. 105-106.)

Nor do we know of anything which justifies its similar statement, including the Vester property, that, "there will be enough left to meet the needs of suitable buildings for that vicinity." (R. 106.)

Assuming that the excess condemnations involved in the Richards and Vester cases are within the intent of the Ohio constitutional provision (an assumption which seems proper, notwithstanding some slight doubt whether it ever intends a sale without restrictions, or an excess condemnation upon any but the restrictive motive) they should be sustained.

It is respectfully submitted that the decisions below in those two cases should be reversed.

HAMILTON WARD,
Attorney General of the State of New York,
Amicus Curiæ.

Brief by:
Henry S. Manley,
Assistant Attorney General.
Albany, March 3, 1930.

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Nos. 372, 373.

Supreme Court of the United States

OCTOBER TERM, 1929.

THE CITY OF CINCINNATI, Petitioner,
vs.
MARGARET W. VESTER.

THE CITY OF CINCINNATI, Petitioner,
vs.
JAMES S. RICHARDS, *et al.*

(On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to Review Its Decision Reported at 33 Fed. 2nd 242.)

AN APPENDIX TO THE BRIEF

Filed Amicus Curiæ, on Behalf of the People of the State of New York, Supporting the Principle of So-called "Excess Condemnation," Which is Written Into Their Constitution. This Appendix Being a Compilation of Some Data Toward a History of Excess Condemnation in the United States.

HAMILTON WARD,
Attorney General of the State of New York.

Henry S. Manley,
Assistant Attorney General.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Some Data Toward a History of Excess Condemnation in the United States.

England, from which we derive most of our ideas of due process, has made long and general use of excess condemnation. Canada uses it. In France, Germany and Belgium it is a time-honored method of effecting public improvements.[*] But enough of that. We shall take up the story in the United States, in the time of Chief Justice Marshall.

IN THE UNITED STATES IN THE 19TH CENTURY.

South Carolina, in 1817, enacted that the city council of Charleston, whenever it was deemed expedient to widen any street, lane or alley, should have full power to purchase or condemn, "the lots fronting on such street, alley or lane." In 1824 this statute came before a court. Counsel for the city urged that the statute gave the power of taking, in every instance, the whole lot. The court held that the statute intended only such portions of the land as were necessary for the street; that if it were construed to authorize taking more, it would be unconstitutional. *Dunn v. Charleston*, Harper's Report 189. The constitutional provision deemed relevant was the prohibition of the State constitution against taking property, except, "by the law of the land."

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[*] For excess condemnation in England, see Herbert S. Swan, "Excess Condemnation, a Report of the Committee on Taxation of the City of New York," 1915, at pages 23-52. See Percy J. Edwards, "History of London Street Improvements." See Flavel Shurtleff, "Carrying out the City Plan," pages 125-132. See Mass. House Doc. No. 288 for 1904, pages 21-43, 53-101. For the experience of Montreal, see Flavel Shurtleff, at page 398 in "City Planning," edited by John Nolen. As for Germany see Senate Doc. No. 422, 61st Cong., 2nd Session; and also the texts mentioned above. See them also for France and Belgium. Upon the entire subject, see Robert Eugene Cushman, "Excess Condemnation," published by Appleton & Co., New York, 1917.

New York, in 1812, ch. 174, empowered the City of New York, in all cases where part only of any lot or parcel of land was required in opening or widening a street, to include the whole lot in the taking, and the corporation might, as to the excess over what was needed for the street, "appropriate the same to public uses, or sell the same." This statute was considerably used,* and not challenged until 1834, when it was held unconstitutional. *Matter of Albany Street,* 11 Wend. 149. The court deduced the constitutional prohibition from the authorization of taking for public use, and said that a taking for private use was, "in violation of natural right", and it did not matter whether feet or acres were involved.

See also, *Embury v. Conner,* 3 N. Y. 511; *Bennett v. Boyle,* 40 Barbour 551; *Matter of City of Rochester,* 137 N. Y. 243, 247.

A provision for excess taking, applicable to Brooklyn, was enacted by chapter 319 of 1833, but it seems to have required consent of the owner. The act incorporating the City of Williamsburgh, chapter 91 of 1851, contained a similar provision.

Massachusetts, by St. 1865, c. 159, provided for the opening of a street, and assessing the costs thereof upon the adjacent properties which were benefited, and further provided that the owner of a lot, taken in part, might elect to surrender all, and be paid the full value, and the city might sell the excess. This was held constitutional. *Dorgan v. City of Boston,* 94 Mass. 223, 241-242.[*] The case would seem to hold that the public has no constitutional protection from such "speculation" by the city; and the reasoning of the court appears to recognize no such protection of the land-owner, either.

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* Herbert S. Swan, op. cit, at page 54, lists some of the streets that were opened under authority of the 1812 statute.

Pennsylvania, in 1868, by Act. No. 1020, sec. 13, authorized the Fairmount Park Commission of Philadelphia to *"acquire"*, and to resell in absolute fee simple, the whole of any tract of land, part of which should fall within the boundaries of lands to be taken for the park. It is not clear whether this statute authorized condemnation, or mere acceptance.

New Jersey, in 1870, by ch. 117 of that year, authorized the replotting in Newark of narrow, short and irregular streets, taking all or any part of the land within certain limits, dividing it into suitable lots, and reselling it. We do not know whether it was exercised, and it seems never to have been challenged.

TREND TO CONSTITUTIONAL AMENDMENTS IN THE PRESENT CENTURY.

MASSACHUSETTS.

The Massachusetts legislature of 1903 provided for a committee to investigate and report upon the advisability of excess condemnation in the execution of improvement projects. The committee appears to have been most diligent and intelligent. Its two reports made in 1904[*] are the first real presentation of the case for excess condemnation ever made in this country, so far as we can discover.

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[*] To similar effect, see Mayor etc. v. Clunet, 23 Md. 449, 463-465. The case of Soulat v. Municipality, 5 La. Ann. 363, involved a similar statute.

The recommendations of the committee were enacted into law as chapter 443, Acts of Massachusetts, 1904, frequently described by writers as the "Remnant Act." One significant change was made, however, between the committee's draft and the enactment. The statute provided for taking the whole of any parcel, where part was actually required for a public work, and the remnant would from its size or shape be unsuited for the erection of suitable and appropriate buildings. It also provided that within six months after completion of the public work notice might be served upon the owner of property adjoining each remnant, to the effect that the public interest required such remnant to be united with his land. If he requested, appraisers should be appointed and the remnant offered to him at the appraised value. If he did not purchase, the remnant should be sold at public auction. In the committee's draft was the additional provision, omitted from the statute, that if the owner of such property adjoining a remnant declined to purchase it, all or part of such adjoining property might be condemned and sold with the remnant.

That this omission was vital to the constitutionality of the project, as viewed by the state court, may be inferred from the advisory opinion of the Supreme Judicial Court six years later. *Opinion of the Justices,* 204 Mass. 616, 91 N. E. 578. The court, in a previous advisory opinion*, had denied the constitutionality of a rather pretentious, but vaguely defined, specific proposal involving:

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[*] Mass. House Docs. of 1904, Nos. 288 and 1096. Part of the former is quoted hereinafter. The latter is a 16 page supplemental report, by Edmund M. Parker, one of the committee, as to the workings of excess condemnation in Paris and Brussels.

> "The obliteration in whole or in part of the present lines of individual ownership along such thoroughfare as may be laid out or constructed, the concentration through the power of eminent domain of such abutting estates in parcels of suitable size and shape, the laying out of rear streets, and the development and use of such parcels, under such restrictions as the public authorities may prescribe, for warehouses, mercantile establishments and other buildings suited to the needs of trade and commerce * * * "

Responding to a new inquiry, the court said (204 Mass. 619-620, 91 N. E. 579-580):

> "We are asked if it would make any difference if the proposed statute contained provisions like those of St. 1904, c. 443, §6. In our opinion, given to the House of Representatives, we intimated that this statute is constitutional. In our judgment it goes to the very verge of constitutionality. The grounds on which we are inclined to sustain it have little relevancy to the stated purpose of the unusual provisions of the proposed statute. They are, first, that there can be no taking outside the location of the public work, except of a remnant of an estate a part of which is actually required for the laying out, alteration or location of a public work, and then only 'if the remnant left after taking such part would, from its size or shape, be unsuited for the erection of suitable and appropriate

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* Opinion of the Justices, 204 Mass. 607, 91 N. E. 405.

> buildings'—in other words, only when there is a remnant that is too small or too illshaped to be of any practical value for the use to which valuable land is commonly put; and secondly, that such a remnant can be taken only upon an adjudication that public convenience and necessity require the taking. Unless it can be said that public convenience and necessity never can require the taking of such a remnant the statute cannot be declared unconstitutional.
>
> "While it is plain that a city or town cannot take land outside a public work for speculative purposes, we can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small, or of such shape, and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work. But this principle is not applicable to a taking for the larger purposes stated in the questions before us."

Thereupon, in 1911, the Massachusetts Constitution was amended to provide for condemnation of excess land, "no more in extent than would be sufficient for suitable building lots on both sides of such highway or street." The power has been exercised many times since then,* but seems never to have been challenged.

OHIO

In the year 1904 Ohio enacted that all municipal corporations should have power to condemn real estate, not only for establishing parks, boulevards, and other public reservations, but also, "for the purpose of reselling such land with reservations in the deeds of such resale as to the future use of said lands so as to protect public buildings and their environs and to preserve the view, appearance, light, air and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto." (97 Laws 334) We do not know what use was made of this power, but it seems never to have been adjudicated.

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* Ch. 186 of 1912, relative to Belmont Street in the City of Worcester; chapters 201 and 326 of 1913, also relative to Worcester; ch. 703 of 1913, relative to Bridge Street in Salem; ch. 177 of 1915, relative to a highway of Nonantum Square in Newton; ch. 329 of 1917, relative to Stuart and Eliot Sts. in Boston; ch. 320 of 1917, relative to a highway in Worcester; ch. 319 of 1925, also 357 of 1926, both relative to the Northern Route out of Boston; ch. 367 of 1926 relative to widening Bridge St. in Haverhill; ch. 364 of 1928, relative to extending Congress St. in Salem.

Probably influenced by the Massachusetts precedent, in 1912 Ohio adopted a constitutional amendment authorizing excess condemnation. This is set out in a footnote to *City of Cincinnati v. Vester*, 33 Fed. 2nd 242. In part, it provides:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

It will be noted that the amendment affords no clue to the purpose of the excess taking which it authorizes, and no limit upon its amount, except what may be deduced from the reference to *resale with restrictions*. In the Vester case, and companion cases, there seems to have been no suggestion that any restrictions were contemplated or desirable. The District Court judge expressly found that the only purpose of the proposed resale was recoupment, and that there was no suggestion as to restrictions. (R. 28, 29.) The Circuit Court of Appeals said (R. 106; reported p. 244):

> "The protection theory has no practical aspects, and may be entirely disregarded. The proofs do not show that the city has any present plan for beautifying or establishing building restrictions on the south side of Fifth street."

It is regrettable that the cases did not arise through the state courts, which could have best interpreted the constitutional amendment in the light of all relevant considerations, and determined whether each of the condemnations involved was within the supposed authority.

PHILIPPINE ISLANDS

In 1905, following a fire in Cebu, a committee was created to provide for widening the streets and adjusting the ownership of land within the so-called "burnt area". Acts of the Philippine Commission, No. 1393. The committee was charged with the duties of laying out streets, adjusting all questions of ownership, and making "such equitable allotment and adjustment of land within said burnt area as may be necessary and practicable, caused by the widening of existing streets, and in the laying out of new streets". It was empowered to acquire title to all lands within the area, by gift or cession, and if necessary by condemnation. We are informed that a most complete adjustment of plots was accomplished, but we do not know whether the constitutionality of such acts was ever challenged.

MARYLAND.

In 1904, following a great fire in Baltimore, there was created by statute what was known as the Burnt District Commission, with power to open streets, etc. By chapter 108 of 1906 this Commission was given power to accept and to resell remnants. This was similar to the Massachusetts statute of 1867.

In 1908 by chapter 166 was enacted a very broad authorization for the City of Baltimore, to purchase or condemn lands adjoining parks, etc., and to sell it subject to restriction for the protection of the public property. This provision was similar to the Ohio statute of 1904.

In 1910 by chapter 110 the Mayor and Common Council of Baltimore, or, by their delegation to it, the Commission on City Plan created under the act of 1908, was authorized to open a public highway, defined by a general description of its termini and course. The act authorized such body, "to acquire for said purposes landed or other property in the bed of said highway and adjacent thereto on either or both sides thereof." Such body should have the power to condemn and acquire by purchase or condemnation such lands, and should also have certain other powers, "*including the powers vested in it by chapter 166 of 1908.*" To effectuate these purposes stock in the amount of a million dollars was authorized.

In 1911 the constitutionality of this project, under certain provisions of the statute constitution, was challenged in a suit to enjoin issue and sale of the stock. *Bond v. Mayor etc. of Baltimore,* 116 Md. 683, 82 Atl. 978. The constitutionality of the statute was upheld, but only by the most convenient innocence and blindness on the part of the court, entirely avoiding discussion of the 1908 statute and the reference to it.* Said the court:

> "We think it is clear that the only purposes for which property is authorized to be condemned are those set out in section 1 of the act, to wit: For the purpose of establishing a public highway over Jones' Falls and making connections between said highway and other highways crossing or adjacent thereto. And this being so, there can be no possible or serious dispute that the use for which property may be acquired and can be taken under section 1 of the act is for a public use."

CONNECTICUT.

By Special Laws 1907, p. 43, the City Planning Commission of Hartford was authorized to acquire land, by eminent domain or otherwise, for establishing parkways, streets, sites for public buildings, and reservations about and along and leading to any of them, and after the completion of such public improvements, "may convey any real estate thus acquired and not necessary for such improvements, with or without reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs, and to preserve the view, appearance, light, air and usefulness of such public works."

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* It appears that the Mayor and Common Council proceeded under the 1910 statute themselves, instead of delegating to the Commission on City Plan, in which were vested the powers of excess condemnation under the 1908 act. Philadelphia, etc., Ry. Co. v. Baltimore, 121 Md. 504, 88 Atl. 263. This fact may have justified passing over the 1908 statute in the Bond case.

We are informed that Hartford has on several occasions used this act with reference to small gores,* but its constitutionality seems never to have been litigated.

VIRGINIA.

In 1906, by chapter 194, the cities and towns of Virginia were authorized to acquire, and to resell subject to limitations as to use, property adjoining parks or monuments, or in the vicinity of them, which is so used as to impair their beauty or usefulness, or property adjacent to a street, of such topography that it impairs the convenient use of the street, "or renders impracticable, without extraordinary expense, the improvement of the same."

By chapter 71 of 1916 the following paragraph was added:

> "And any city or town in this Commonwealth proposing to open or widen a street by taking any part of a block or square in such a manner that the value of the property abutting the proposed street would be injuriously affected unless the property on such block or square is re-platted and the property line re-adjusted, then and in that event the city or town at the same time it acquires the land for said street may, in its discretion, also acquire by purchase, gift, condemnation or

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* Herbert S. Swan, op. cit., page 86, note. The Corporation Counsel of Hartford says the act has never been expressly resorted to, but in laying out streets occasionally a slight excess has been taken and sold.

> otherwise, all or any part of the property on such squares or blocks and may subsequently re-plat and dispose of the property so acquired, in whole or in parts, making such limitations thereof as it may see fit."

This was the statute which was challenged, in 1921, in the case of *Richmond v. Carneal,* 129 Va. 388, 106 S. E. 403. The court noted that the proposed street merely cut off a little corner of Carneal's lot, not affecting his house, which was a home and a place of business, where he had been for thirty or forty years. It noted that the proposal was to take land not needed for a street, replat it and sell it, presumably at a profit, as no reason was assigned for the excess condemnation except that the city council was of opinion, "that not to acquire all, or parts of the property on certain blocks, squares or lots, through which the proposed street will pass, would render it impracticable, without extraordinary expense, to make the proposed improvement." The court concluded that such a taking was not for "public use", and so was in violation of the state constitution.

The relevant provision of the state constitution is found in section 58:

> "It [the general assembly] shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation."

In 1928 there was added to this provision, in completion of the sentence, these words:

> "the term 'public uses' to be defined by the general assembly." *

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* The next session of the Virginia legislature after the constitutional amendment commenced on January 8, 1930, at which session some excess condemnation may be adopted.

PENNSYLVANIA.

In 1907, by Act No. 315, there was conferred upon all the cities of Pennsylvania, not only the power to appropriate property for parks, parkways and playgrounds, but also power to appropriate, "neighboring private property, within two hundred feet of the boundary lines of such property so appropriated * * * in order to protect the same by the resale of such property with restrictions * * *" A brief in support of this statute was filed with a congressional committee in 1909, and shows the views upon which the legislation was supported.[*] In 1913 the statute came before the state Supreme Court, and was adjudged unconstitutional. *Penna. Mut. Life Ins. Co. v. Philadelphia,* 242 Pa. 47, 88 Atl. 904.

It seems that the plaintiff corporation owned two lots sixty-six feet wide and one hundred sixty feet deep, having frontage on a down-town street, and that the city proposed to open a new parkway passing diagonally across the rear of the lots. The city passed an ordinance in 1912 providing for condemnation of certain described private property outside of and not more than two hundred feet distant from the proposed parkway, including plaintiff's lots. The plaintiff sought to enjoin condemnation of its lots, alleging, "that the portion of its property lying outside of the parkway was taken by the city to resell to the Bell Telephone Company of Pennsylvania, a private corporation, or to other private parties." The city denied this allegation, and asserted that the taking was to secure control of the property to protect the parkway as authorized by the Act. The court noted that, "this denial must be read in connection with the ordinance of January 16, 1913, which became effective after the answer of the city was filed, authorizing the mayor to execute an agreement selling the property appropriated outside the parkway, including plaintiff's property, to the telephone company." There seems to have been no showing whatever as to the specific relations of this transaction to protecting the appearance and usefulness of the proposed parkway.

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[*] Senate Doc. No. 422, 61st Cong., 2nd Session, pages 30-36.

Even if there were appropriate restrictions in view, the court felt that the act gave an authority too arbitrary. The court said:

> "It deprives the owner of his right to accept the restrictions and retain the property on the same terms as the city's vendee would hold it. It empowers the city, at the pleasure of its officials, to transfer property on which is a business plant owned by one individual or corporation to another who is engaged in the same or another business. One man may be deprived of his home for the benefit of another. In view of its provisions conferring almost unlimited discretion on cities or their officials in exercising the powers granted, it is idle to say that the statute furnishes no opportunity to produce such results or to promote a private purpose."

A proposed constitutional amendment authorizing excess condemnation was passed in 1915*, but apparently it was not submitted to a subsequent legislature, or to popular vote.

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* Joint Resolution No. 1 of 1915. This provided as follows:
"The State, or any municipality thereof, acquiring or appropriating property or rights over or in property for private use, may, in furtherance of its plans for the acquisition and public use of such property or rights, and subject to such restrictions as the Legislature may from time to time impose, appropriate an excess of property over that actually to be occupied or used for public use, and may thereafter sell or lease such excess, and impose on the property so sold or leased any restrictions appropriate to preserve or enhance the benefit to the public of the property actually occupied or used."

OREGON.

In 1913, by chapter 269, this state conferred upon cities power to condemn and to sell, subject to restrictions, for protection of the public property, land in excess of that needed for public squares, parks or playgrounds. The only limitation is that the excess property be within two hundred feet of the public property, and that its control be reasonably necessary in order to protect such public squares, parks or playgrounds, their environs, the preservation of the view, appearance, light, air, health or usefulness thereof. These provisions were amended in 1921, ch. 192, and are found in the codification of Oregon Laws, sections 3837-3844. They appear not to have been the subject of litigation.

WISCONSIN.

In 1909, by chapters 162 and 165, each being a different and independent provision, the right was conferred upon cities and counties to condemn, and to resell with appropriate restrictions for protection of the public property, additional areas near streets, squares, parks, public buildings, etc. There was no specific restriction as to distance.

In 1911, by chapter 486, cities were given such a power relative only to boulevards and parkways and limited to land within three hundred feet.

We are uncertain whether these provisions were ever used, and cannot find that they have ever been the subject of litigation, or been repealed.

In 1912 Wisconsin adopted an amendment to its constitution, at Article XI section 3-a, as follows:

> "The state or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public work and improvements, and their environs, and to preserve the view, appearance, light, air and usefulness of such public works."

In 1913 a much broader amendment was proposed* but was defeated upon submission to popular vote in 1914.

We do not know how extensively excess condemnation has been employed in Wisconsin; nor does the article by Walter H. Bender, Esq., in 13 Marquette Law Rev. 69 [1929] entitled "Excess Condemnation in Wisconsin", cast much light upon that question.

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* Joint Resolution No. 25 of 1913. This was identical in language with the proposition, hereinafter quoted, defeated in New York in 1911.

RHODE ISLAND.

In 1916 Rhode Island adopted Article XVII of amendments to its constitution, as follows:

> "The general assembly may authorize the acquiring or taking in fee by the state, or by any cities or towns, of more land and property than is needed for actual construction in the establishing, laying out, widening, extending or relocating of public highways, streets, places, parks or parkways; Provided, however, that the additional land and property so authorized to be acquired or taken shall be no more in extent than would be sufficient to form suitable building sites abutting on such public highway, street, place, park or parkway. After so much of the land and property has been appropriated for such public highway, street, place, park, or parkway as is needed therefor, the remainder may be held and improved for any public purpose or purposes, or may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease, the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same."

The last provision suggests difficulties in its operation, but we cannot find that there has been any litigation relative to the amendment.[*]

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[*] We note that at least one statute was enacted in 1929 under the Amendment. This is chapter 1453, relative to taking land in the City of Central Falls for highway purposes. Probably there have been other similar acts since 1916.

ILLINOIS.

In the Plan of Chicago, published in 1909, the need for excess condemnation in carrying out the plan was presented, it then being supposed that a statute would be sufficient. Decisions in other states indicated the need that excess condemnation be authorized by constitutional amendment, and in 1918 a pamphlet* was published recommending the calling of a constitutional convention to consider this and other proposals. Such proposals were before the Constitutional Convention of 1920, and we believe were adopted by it, but the entire work of the Convention failed of acceptance upon submission to popular vote, for reasons not involving the merits of excess condemnation.

In 1927 an act of General Assembly was passed (1927 Laws of Illinois, page 227) subsequently approved by Chicago voters, providing for excess condemnation on a somewhat guarded plan, as follows:

> "In any case brought under the statutes of the State of Illinois for the acquirement of property through the exercise of the right of eminent domain, whether the same is done in connection with a local improvement or otherwise, it shall be lawful for the City of Chicago to take in fee simple and to hold, lease or sell more land than is needed for public improvement whenever the court in which the proceedings have been instituted finds that such excess land is required to protect, preserve or aid the improvement and is reasonable in quantity therefor."

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* "Excess Condemnation, why the City of Chicago should have the power," etc., a report prepared by the Chicago Bureau of Public Efficiency. September, 1918. 58 pages.

MICHIGAN.

In 1928 there was added to the state constitution, as Article XIII, section 5, the following provision:

> "In exercising the powers of eminent domain and in taking the fee of land and property that it needed in acquiring, opening, and widening of boulevards, streets and alleys, municipalities shall not be limited to the acquisition of the land to be covered by the proposed improvement, but may take such other land and property adjacent to the proposed improvement as may be appropriate to secure the greater degree of public advantage for such improvement. After so much of the land and property has been appropriated for any such needed public purpose, the remainder may be sold or leased with or without such restrictions as may be appropriate to the improvement made. Bonds may be issued to supply the funds to pay in whole or in part for the property so appropriated, but such bonds shall be a lien only on the property so acquired and they shall not be included in any limitation of the bonded indebtedness of such municipality."

CALIFORNIA.

In 1914 and in several subsequent years constitutional amendments permitting excess condemnation were proposed and failed to be adopted. In 1928 the following provision was adopted as Article I, section 14-1/2:

> "The state, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways

> and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from the closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works. The Legislature may, by statute, prescribe procedure."

NEW YORK.

New York State, which seems to have been the pioneer in enacting excess condemnation, and anticipated only by South Carolina in holding such legislation unconstitutional,* seems also to have established, in some respects, a priority in the trend to constitutional amendments.

It was on March 4, 1910, that the *Opinion of the Justices* (204 Mass. 607, 91 N. E. 405) was handed down. On March 17 a concurrent resolution to write excess condemnation into the New York constitution made its appearance in the Legislature. It had previously been introduced in 1909, but had failed of adoption. This proposal, which was defeated upon its submission to the people in 1911, read as follows:

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* These topics were treated above, page 3.

> "When private property shall be taken for public use by a municipal corporation, additional adjoining or neighboring property may be taken under conditions to be prescribed by the legislature by general law. Property thus taken shall be deemed to be taken for public use."

It is difficult to conceive of a broader provision. It suggests no limitation whatever, of purpose or extent. It would seem that the voters of New York State displayed wise discrimination when they defeated that proposal by votes of 254,095 and 357,881; and when two years later they adopted, by votes of 424,928 and 270,467 the present provision (N. Y. Const., Art. I, sec. 7):

> "The legislature may authorize cities to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased."

An amendment adopted in 1927 added the words *"and counties"* after the reference to *cities* in the first line.

This power of excess condemnation has been conferred upon several cities, and at least one county. *

In Buffalo it has been used, at least in the case of Lovejoy street, where improved lots approximately 100 feet in depth were taken in connection with widening 24 feet along one side of the street. We are informed that the City of New York has exercised the power of excess condemnation "in twelve or fifteen proceedings, but with few exceptions, the amount taken in excess has been limited to the remnants of parcels parts of which were taken for the improvement." Syracuse has used excess condemnation in widening South Salina Street, one of its principal business streets. We are informed that Rochester has exercised the power in twelve or thirteen cases, at least it has adopted about that number of ordinances providing for excess condemnation in specific cases. For some references to actual use, in Rochester, see hereinafter, page 47.

There are only two cases, so far as we can learn, where the power has been challenged. *Matter of City of Rochester*, 227 App. Div. 151 (Nov. 7, 1929) did not express any view upon the constitutional point, although it was raised. We are informed that the city has accepted that decision.

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* Full power of excess condemnation was vested in certain cities, as indicated: Syracuse, ch. 300 of 1914; New York City, ch. 593 of 1915 and ch. 112 of 1916; Rochester, ch. 431 of 1920; Buffalo, ch. 429 of 1920; Jamestown, ch. 665 of 1923, sec. 45; Yonkers, ch. 556 of 1926; Poughkeepsie, ch. 545 of 1928. Niagara Falls was vested with the power, in connection with widening Main St. only, ch. 170 of 1923. Erie County was vested with full power of excess condemnation, ch. 538 of 1929. Since enactment of the City Home Rule Law, ch. 363 of 1924, separate enabling acts for specific cities may be unnecessary.

Matter of City of Yonkers v. M. E. D. Corporation et al., now pending in the state Supreme Court, at special term in Westchester County, was a case of an important street widening, using excess condemnation, originally opposed on other grounds, and in which the constitutional question was first raised in October, 1929.

The case of *Matter of Tuthill*, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781, decided in 1900 by the highest court of New York State, should here receive mention, not because it is relevant, but because relevancy has several times been falsely attributed to it. The true significance of the case appears to be correctly stated by the official headnote: *"Drainage Act (L. 1895, ch. 384) not authorized by Art. 1, Section 7, State Constitution,* and is void."* The opinion by Gray, J., so far as concerns all his references to the 14th amendment of the federal constitution, was concurred in by *none* of the five other judges sitting in the case. See the final page of the opinion. Apparently L. R. A. errs, by indicating that Haight, J., concurred in the opinion of Gray, J., instead of in the memorandum of Parker, Ch. J., which expressly said that the provision of the State Constitution did not violate the Federal Constitution. Subsequent decisions of the federal Supreme Court support the memorandum, and repudiate the dictum of Judge Gray. *Clark v. Nash*, 198 U. S. 361; *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527.

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* This reference is to an earlier and separate part of the same section, relating only to drainage.

THE LITERATURE OF EXCESS CONDEMNATION.

No effort will be made to be complete in references. An effort will be made to be representative. The purpose will be, under this heading, to afford quotations indicating what has been published, in the United States in the present century, indicating the justification for excess condemnation, and the appropriate occasions for its exercise. If these quotations are truly representative, they reflect the views, economic and political, which prevailed, and are prevailing, in the trend to constitutional amendments authorizing excess condemnation.

First, and outstanding, in this field, is the Massachusetts report of 1904.[*] The following excerpts are from pages 4-8 of the majority report:

> "The committee presents the following conclusions:
>
> It has clearly appeared, from the evidence submitted to us, that the present system of laying out new streets or widening or altering existing ones, under which only the land actually required for the street is taken, is, especially in those parts of cities which are covered with existing buildings, productive of serious public disadvantages; and a brief consideration of the matter is sufficient to show that this difficulty is inherent in the sys-

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[*] Mass. House Doc. No. 228 for 1904. Report of a committee to investigate excess condemnation. 101 pages. The report itself occupies the first 14 pages; the draft of the proposed act appears at pages 15-20; pages 21-43 deal with excess condemnation experience in London; pages 44-52 with the French system; pages 53-101 with those and also the provincial towns of England. This last was a separate report by Mr. Meyer, who dissented from the two other committeemen, in that he did not regard excess condemnation as justifiable even in the case of remnants. See page 14. Mass. House Doc. No. 1096 for 1904 is a 16 page supplemental report, by Edmund M. Parker, one of the committee, as to the workings of excess condemnation in Paris and Brussels.

tem itself, and must persist unless some modification of that system can be devised.

The land abutting on any existing street is divided and arranged in lots, which, as well as the circumstances have admitted, are adapted to the street in its present condition, and the buildings thereon are constructed in conformity therewith. Any widening of the street not only destroys the existing buildings, but, by reducing the size of the abutting lots, leaves the residues or remnants of many of them of such shape and size as to be entirely unsuited for the erection of proper buildings, unless and until these remnants have been united with the adjoining properties, generally with those in the rear, which are thus enabled to extend out to the new street lines.

The same condition is found, and frequently even to a greater extent, when a new thoroughfare is laid out through existing blocks covered with buildings.

Hence, when an existing street is widened or a new thoroughfare is laid out under the present system, the lots on one or both sides of the new or widened street are left in such condition that, until a rearrangement can be made, no suitable buildings can be erected thereon, and the public benefit to be derived from the improvement is in great measure lost.

The street may be valuable as a thoroughfare or as one for through traffic, but not for either business or residence purposes; and striking instances of this have been presented to the committee in connection with street improvements in the City of Boston.

Not only is such a situation a great disadvantage to the city, in hindering and sometimes preventing its proper development, but it will easily be seen that this state of affairs renders the collection of betterment assessments extremely difficult, since the benefit to the surrounding property which should accrue from the improvement is actually not received until these residues or remnants have been united with the adjoining lots—a process which, under the present system, may take years.

It often happens that the owners of these remnants, desirous of deriving some income therefrom in the meanwhile, erect thereon temporary structures, unsuited for proper habitation or occupancy; and such structures are too frequently made intentionally objectionable, both in appearances and in the character of their occupancy, for the purpose of compelling the purchase of such remnants at exorbitant prices; with the result that a new thoroughfare, which should be an ornament to the city, is frequently for a long period after its construction disfigured by unsightly and unwholesome structures, to the positive detriment of the public interests. These results, which seem inevitable under the present system, may operate to prevent the undertaking of much-needed street improvements.

These matters are forcibly presented in the testimony of Mr. Charles, chairman of the Board of Street Commissioners of Boston, and of his associate commissioners, Mr. Duane and Mr. Gallivan, to which testimony especial attention is directed.

Furthermore, it is believed that the taking of whole estates, instead of taking the greater part and leaving an undesirable remnant, would not materially increase the initial expense of the undertaking; inasmuch as a city which takes, under the present system, so much of an estate as to leave the remainder unsuited for building purposes, is often obliged to pay for the value of the part taken, and for the damages to the remaining part practically as much as it would be obliged to pay for the whole estate.

What has been said above indicates the

public considerations which render a change in the existing system desirable.

There is also, however, another side to the question, viz., that of the private owner, the consideration of which appears to point to the same conclusion. It frequently happens that an owner, the greater part of whose estate is necessarily taken for a public work, would prefer not to be left with the remnant on his hands, and, if an opportunity were offered, would voluntarily request the city to take the whole estate. Many people recognize that there is less opportunity for differences of opinion upon the question of the market value of a whole estate than over the more complicated question of the value of the portion which has been taken, and the damages to the remainder by reason of such taking; and hence a system under which the city could acquire the whole estate would be productive of greater ease in the settlement of damages, and less likelihood of litigation over the question involved therein.

* * * *

With regard to the acquirement by compulsory taking of land beyond the limits of a given public work, we find that two different systems have prevailed:

1. The taking, in addition to the land actually required for the public work, of all the property within certain bounds in the neighborhood of the proposed work; the rearranging of the lot lines of the property so acquired; and the disposal of this property by sale or lease for the benefit of the city.

2. The taking, in addition to the land actually required for the public work, of such residues or remnants of lots only which, in consequence of the taking for the public work, will be left of such shape and size as to be unsuited for the erection of proper buildings; and also of such portions of the adjoining properties as it may, in consequence of

the refusal of their owners to purchase these remnants, be necessary to acquire, in order to make proper building lots abutting on the proposed street.

In favor of the first system, it has been urged that, in consequence of the carrying out of the proposed public work, there will be an increase in value of the surrounding property, caused by no act of its owner, but entirely by the act of the public body, and at the public expense; that it is inequitable that such increase in value should not accrue to the public, to the expenditure of whose money it is solely due; that the method of acquiring the abutting property in the neighborhood is the best method of securing such benefit to the public; that it is far simpler and more equitable than any system for the collection of betterments; and that, if the owners of the abutting property are paid its full value as it was before the improvement took place, they have no cause to complain.

This is the system which, in substance, has been adopted for important street improvements in many cities of Great Britain, Belgium, Switzerland and Italy, and has, we are informed, been on the whole successful in its operation, and is believed in certain cases to have materially reduced the cost of public improvements.

As against this system, it is urged that the State ought not to dispossess the private owner of his property simply in order that the public work may be carried on at less cost, through re-sale of the property so acquired; that the expense of public works should be met by taxation, and not by the taking of private property for no other purpose than to benefit the public exchequer by its re-sale; that the owner to take property for such purposes, as it contemplated by the first system is practically a power to enter into a land speculation, which may result disastrously.

> In the case of our cities, there is the further objection that the adoption of such a system might easily carry the initial cost of an undertaking beyond the debt limit of the municipality.
>
> In support of the second system, it is urged that the ends of public necessity and convenience, for which private property may properly be taken, can all be accomplished by limiting the taking, in addition to the land actually required for the public work, to such remainders of lots as are by themselves unsuited for proper building purposes, and by uniting them to the adjoining properties, compulsorily, if necessary; and that the right to take private property should not be extended beyond these salutary limits.
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> Such is the system which, originally established for the City of Paris, has now been extended to many of the other important cities of France, and under which many of their great improvements have been carried out; and such a system should, it would seem, if fairly and judiciously applied, be ample to our needs.
>
> In the draft of an act herewith submitted we have, in substance, adopted this plan, and believe that it will be time enough to consider adopting a more comprehensive scheme if the plan proposed shall, after a fair trial, be found insufficient to our needs.''

Nothing of particular importance in this field has come to our attention, from the time of the 1904 report just quoted, until 1910.

The presentation of excess condemnation, made incidentally to other proposals, before the Senate Committee on the District of Columbia, in 1909 by Mr. Benjamin Clarke Marsh,[*] was unsatisfactory. The recoupment feature was all he touched upon, and it clearly had no appeal to the Senators.

In 1912 Hon. John De Witt Warner prepared a report [*] leading to the conclusion that "excess condemnation" (*i. e.*, condemnation motivated primarily by expectation of recoupment) was unconstitutional, but that "incidental condemnation" (*i. e.*, condemnation motivated primarily for a public use or benefit rather than recoupment) was constitutional. The following quotations are from that report:

> "'Excess' condemnation involves the practice of a state (or municipal division thereof), in order to realize profit for public account, so to use its governmental prerogative as to get a footing to compete with the citizen in 'business'—that is to say, such activities as are normally impressed with no trust for public service. 'Incidental' condemnation involves the taking, whenever the public needs them, of all such lands as, for convenience, economy or other essential conditions, are needed for public use.
>
> "How radically these differ is obvious. How narrow is the dividing line is equally plain. For it might be argued—and in the past has been maintained, especially in continental Europe—that, provided only the citizen is paid full price for property taken, he has no just ground for complaint, even though the taking be one that arbitrarily displaces him in order to give the public the

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[*] Senate Doc. No. 422, 61st Cong., 2nd Sess. See particularly page 12.

[*] "Report on Scope and Limits of Expropriation—'Incidental' vs. 'Excess' Condemnation," by John De Witt Warner. Pamphlet, 30 pages. Published by Dept. of Docks and Ferries, New York City, May, 1912. For an account of Mr. Warner, see Who's Who in N. Y.; also Who's Who in America.

very opportunity for speculation or investment for profit of which it deprives him. And continental cities are frequently allowed to condemn lands by wholesale for disposal at retail, at such profit as to offset what would otherwise be the cost of what they keep.

"But it may now be considered as well settled in America (1) that a citizen cannot be compelled to part with his property in order to enable the public to do what is normally the business of the citizen, and (2) that investment for resale at profit (even though transacted by the public) is a business of *private character* rather a *public use.* Two criteria have been suggested. One, legal precedent for which is established, is that, provided the essential purpose of the taking is a public one, incidental results of private character may be disregarded. * * * The other test suggested is that of the duty—which carries with it the power of the public to do in businesslike fashion whatever it is given the right to do at all. * * * But when it is considered that practicability itself is largely a matter of proportion between expense involved and results to be gained, this criterion merges in the other, with this difference: That in the latter case it is the *taking* (as distinguished from the *use*) that is incidental—a distinction that in its turn frequently dwindles to the vanishing point."

* * *

"Within the more obvious applications of the principles already established, to reform slum conditions by condemnation of large areas for parks or for streets to give access and proper circulation is a proper though most costly use of public funds—justified by the health and order thus promoted, though it but indirectly affects the more vital conditions involved. This granted, can there be a question but that we may also enforce and even provide for housing, living and business conditions as we already do for education and recreation? And even more so, can we not?—should we not?—do this in the way at once most conservative and enterprising—by taking freely all lands needed for thorough and economical treatment to such use; retaining them only so far and so long as needed therefor; and selling the rest to be developed by private enterprise under the bettered conditions to secure which they were taken? Thus considered and administered, *Incidental Condemnation* would be a self-adjusting process by which the public shall ever so meet the ever developing conditions of civilization as to keep most open the field for public enterprise and lessen the obstruction and extortion to which the development of every city is subjected by minors, absentees, speculators and 'dog-in-the-manger' interests. For each of these, protection in holding property it cannot or will not use, until for public ends it is taken at full compensation, is as generous treatment as any owner can ask or any self-respecting community grant.

As compared with this, *'Excess' Condemnation*—to permit the public to speculate in land—is a contrast. Incidental Condemnation uses government power to clear the way for the best development of private enterprise, and thus to promote it. Excess Condemnation would not merely rival private enterprise but discourage it in the very direction where it is most needed, and thus add to public burdens. Indeed, the very ground on which Excess (as distinguished from Incidental) Condemnation is favored—that of financial profit to the community in order to pay for public improvements without recourse to taxation—is that on which Excess Condemnation should rather be condemned. For Incidental Condemnation would permit every taking needed to facilitate any *public* function—that is any business which the com-

> mon sense of a state judges can best be done the public business only such as the common sense of the community still considers as more properly the subject of private than of public enterprise, and public meddling with which will be most likely to be demoralizing and disastrous—to private business by unequal competition therewith; to the public by its unfitness to do such business and the certainty (masked as for the time it may be) that taxpayers must pay for it in the end. Incidental Condemnation is but the use of business methods in public business—Excess Condemnation an experiment in what, as a practice, civilization distrusts.
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> "It is no answer to say that the experiment of to-day may be the normal of tomorrow. For we are discussing not how far the public should be allowed to try experiments as such, but rather the methods by which it can prudently transact the business which is admittedly its duty. Nor are we suggesting limits to the public powers every community must assert; but rather that the benefit of any doubt shall always be given toward relegation to private enterprise of activities not needed to fulfill any public function—among which will long remain real estate speculation."

At about the same time the Warner report appeared, there was published in The American City[*] a signed editorial, by Mr. William Bennett Munro, of the Bureau for Research in Municipal Government, Harvard University, in part as follows:

> "Throughout Europe it has long been the practice of cities, in carrying through their projects of street reconstruction, to take by condemnation proceedings more private land

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[*] 6 Am. City 627-628, April, 1912. For an account of Mr. Munro, see Who's Who in America.

than is actually needed for the improvements themselves. Then when the work is finished the unused lands are sold at the enhanced prices and the municipality is enabled thereby to recoup itself for at least a part of its outlay. * * * In the United States, under existing constitutional provisions, street reconstructions upon this plan are seldom possible. * * * This situation places serious obstacles in the way of all large municipal undertakings. It means, for one thing, that although public improvements add greatly to the value of all private property within an adjacent zone, the city gets only a small share of this increment by means of a betterment levy, and often not even that. Moreover, when streets are broadened or new ones opened, these new thoroughfares are certain to be fronted, under our present restrictive arrangements, by irregular and small-sized lots of land wholly unsuitable for proper building development. These lots are in the hands of various private owners, and the task of consolidating them by private negotiations is always tedious and difficult. That is why, for years after a street has been widened, the lots on both sides of it look as though they had passed through a bombardment. Prompt rebuilding is impossible; the reconstruction of private property must be preceded by a process of land consolidation which often takes years to accomplish. * * * There are, of course, grave and obvious objections to anything which would allow cities to indulge in a carnival of land speculation under the guise of public improvement schemes. As a buyer and seller of land the average American city has a pretty poor record. * * * But the Massachusetts system has great merits, quite apart from the question of financial saving * * * ."

Meanwhile the present New York constitutional provision had been passed by the 1912 legislature.

The Annual Conference of New York Mayors had never made the earlier and far broader proposal the subject of a resolution, but on June 10, 1912, at Utica, the representatives of some thirty-five cities of the State passed the following resolution:

> "Whereas, all the cities of the State are concerned with plans for improvement requiring the acquisition of land for public purposes, and under existing laws are unable to accomplish these purposes to the fullest extent because they cannot acquire or control the use of lands abutting on such improvements, therefore,
>
> "Resolved, that the Constitutional Amendment which has passed the present Legislature authorizing what is known as 'excess condemnation', be strongly approved by this Conference and its passage by the next Legislature and its approval by the people is earnestly recommended as a means of far-reaching importance to all the cities."

A month later, at the 18th annual meeting of the National Municipal League at Los Angeles, Mr. Robert S. Binkerd, secretary of the New York City Club, reported for the League's committee on excess condemnation, of which he was chairman, in part as follows:[*]

> "In built-up portions of modern cities necessary street adjustments cannot be made without leaving much of the abutting property in unusable or unsuitable form. The scattered private ownership of such parcels long retards proper development along the improvements, and represents an economic drag on the whole city. * * * For a city to spend thousand or millions of dollars in the creation of parks, boulevards and public

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[*] See 2 Nat. Mun. Rev., supplement, page 24. For an account of Mr. Binkerd, see Who's Who in N. Y.; also Who's Who in America.

> places and then to permit the destruction of the beauty it has created by idiosyncrasies of abutting property owners is a waste of public moneys. The only thoroughly effective instrument for protecting such public investments and for correlating city land into its most usable forms is the power of excess condemnation vested in city governments. Whatever recoupment may be received from the re-sale of property so acquired is but an incident in the exercise of this power for public purposes. Even though there be no recoupment, there is a substantial financial advantage in the ability to acquire whole parcels and thus escape the payment of damages for the destruction of the usability of a parcel."

Mr. Binkerd was a member of the Committee which in January, 1913, reported to the Mayor of New York City, in part as follows*:

> "The City should be empowered to exercise the right of excess condemnation in undertaking public improvements, especially in the laying out of new streets and in the widening or extension of old ones. The financial advantage that will accrue to the City from the exercise of this right will be found quite as much in the increase of the taxable values due to the more economic replotting of areas adjacent to such improvements as to the profits derived from the resale of surplus land. The land adjacent to a street is generally divided into plots, the shape and size of which are adapted, as well as might be, to the street's present use and condition. Widening a street, or laying out a new one in a built-up quarter, disturbs this equilibrium. Not only are the existing buildings destroyed but the abutting lots, after the work's comple-

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* "Report of the Commission on New Sources of City Revenue," City of New York, submitted to the Mayor, etc., Jan. 11, 1913. Pamphlet, 116 pages. The quotation is from pages 79-80.

tion, are frequently left so distorted in shape and so diminutive in size as seriously to impair, if not utterly to destroy, the proper use and development of the thoroughfare. For such a street to attain its natural importance it is necessary that the land fronting upon it should be wholly rearranged and replotted.

There are many instances in New York where street improvements have appropriated all but ten or twenty square feet of large lots. Remnants of such small size are not only useless themselves, but they also keep other lands to the rear of them from being utilized to their best advantage. The present practice in making street improvements, in fact, instead of enhancing the values of the adjacent land, frequently so militates against its best economic use as actually to cause depreciation in the taxable values of the City.

Under excess condemnation, the City might, in addition to the land requisite for a thoroughfare, appropriate these small parcels, obliterate the existing lot lines, and replot the frontages of the street in a manner conductive to its most wholesome development. The City would be in a far better position than the private owners to replot these injuriously affected estates. The cost, moreover, of acquiring the additional land would be negligible. When so much of a lot has to be taken as to leave the remainder practically worthless, the price that must be paid for the appropriated part is, as a rule, as great as the market value of the whole."

In 1914 was published a volume by Mr. Flavel Shurtleff*, wherein he devoted a chapter to "Excess Condemnation". On the last pages of it, he set forth these conclusions:

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* "Carrying Out the City Plan," by Flavel Shurtleff. A Russell Sage Foundation Publication. Sub-octavo, 349 pages. Published by Survey Associates, Inc., New York, 1914. The chapter on excess condemnation is at pages 103-137. The quotation is from pages 136-137. For an account of Mr. Shurtleff, see Who's Who in N. Y.; also Who's Who in America. Frederick Law Olmstead collaborated in the text cited.

> "In the absence of more convincing precedents too much reliance should not be placed on excess condemnation as a method of distributing the cost of public improvements. Where the maximum physical benefit from an improvement can be secured under the present restricted power of eminent domain, excess taking should not be resorted to except in rare cases where it would involve few expensive buildings and where the land value is so low that the inevitable tendency is upward. Rather than introduce excess taking for the purpose chiefly of recouping the city's investment, the highest possible return should be sought by the American method of special assessment, already proved an eminently successful method of distributing the cost of the acquisition of land for public purposes.
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> "But the use of excess taking to protect in value, both economic and esthetic, of a business thoroughfare, park, or parkway is sometimes essential to the full success of a great improvement. Only by its use in some cases can the full advantage of an improved thoroughfare be secured by providing abutting lots of size and shape adapted for suitable structures. Only by selling surplus land under restrictions can the city most effectively control the fringe along the widened thoroughfare. Whether its use results in a net financial profit or not is a secondary consideration if it accomplishes a necessary result more completely and efficiently than can otherwise be done."

In 1915, in The American City*, appeared an article by Mr. Frank B. Williams, relative to city planning and the restrictions upon private property which it involved. In the course of this he said:

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* "City Planning Restrictions on Private Property," 12 Am. City 470-476. The quotation is from page 474. For an account of Mr. Williams, see Who's Who in N. Y.; also Who's Who in America.

> "Excess condemnation is most often urged either in case of a new business street cut, or an old one widened, through a low class development in the center of the city, or of a boulevard in the outskirts through unimproved land. In either case one or more of three effects may be expected:
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> "First, the adjacent land may be raised in value. May not, in this event, the building of the street and the taking of the extra land to sell again in order to help pay for the street be regarded as one business enterprise? The courts of this country are inclined to think not. There are decisions stating that the extra taking and resale are a separate real estate transaction, and therefore not a taking for a public use.
>
> "Secondly, the cutting of the new street may leave remnants of lots on either side of it not large enough for independent improvement, which shut off the land immediately back of it from the street and from the possibility of improvement in connection with the street. If building on the street be delayed until private initiative unites land ownership in these cases, the delay will be a long one. The result will be that the city will lose much in taxes, and the new street, by reason of its ugly appearance for so many years, be given perhaps a character that will permanently impair its usefulness and lower values on it. On this second ground the courts seem inclined to uphold excess condemnation."*

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* Mr. Williams cites no decision in support of that last sentence. The third expected effect, or motive for excess condemnation, which he discusses, is the possibility of resale with protective restrictions.

The year 1915 also saw the publication of an elaborate report on "Excess Condemnation", made by the Committee on Taxation of the City of New York, of which the principal part is a report prepared by Mr. Herbert S. Swan, lawyer and city planning consultant, of New York City, for the National Municipal League[*]. The Committee refers to the constitutional amendment adopted two years before, and to the very recent act empowering the city to exercise excess condemnation. It refers to the three possible justifications for such exercise, and says of the replotting of remnants (page 6):

> "New York furnishes several 'horrible examples' in cutting new streets through sections already built up without excess condemnation. Delancey Street in Manhattan and Flatbush Avenue Extension in Brooklyn have both been held back in development and in the increased value which the improvement promised, by the small, irregular, odd-shaped building lots which were left.[*] These are in many cases unsuited to proper building unless united with adjoining properties held by other owners. The public loses in tax value and sightliness and the private owner is injured because his lot is not available for suitable development. A glance at the maps accompanying this report, showing the lot lines after these streets were cut through, is proof conclusive of loss and waste under the old system. Although the Flatbush Avenue Extension has been practically completed for three years and despite its strategic position, development has not begun. The street still looks, to borrow an expression of Lawson Purdy's, 'as if it had been devastated by an earthquake.' European nations long ago met

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[*] "Excess Condemnation." New York, 1915. Octavo, 122 pages, with many illustrations, folding maps and statistical tables, etc. At page 13 it is stated that much of this material was used by Mr. Lawson Purdy before a committee of the New York Assembly at Albany, in advocating the adoption of a resolution providing for the excess condemnation constitutional amendment. The maps and photographs appearing pages 99-118, which are apparently some of this material, are particularly striking, and are bound in at the back of the present compilation.

[*] Folding map at back of this Appendix shows the Flatbush Avenue Extension situation.

> this situation and have empowered local governments to relocate and replot such areas. Excess condemnation would leave the city free to rearrange and subdivide the land fronting the improvement into plots of the size and shape best suited to the proposed development."

As to recoupment, the Committee says (page 7):

> "While revenue is not the principal reason for excess condemnation it is a strong incidental consideration."

It is not practicable, and might be thought unduly burdensome upon the reader, to reprint the material by which Mr. Swan supports his argument for employing excess condemnation for the replotting of lots, particularly in connection with widening streets. His method of arguing from specific examples of what had happened when certain streets in New York City were opened without benefit of excess condemnation, has seemed so meritorious that some of his material has been bound in at the back of this Appendix.

We trust that the report of Mr. Swan can at least be scanned sufficiently to appreciate the nature of the data, and the wealth of it, by which he supports his argument. Among other interesting conclusions, are these:

> "As has been pointed out, leaving shallow and misshapen remnants in the possession of private owners hampers the city's economic development. As much can be said for its aesthetic development. Frontages which, if connected with adjacent land, would furnish sites for substantial and ornamental struc-

tures, are now occupied by ugly shanties or billboards. * * * The expediency of condemning excess lands for the purpose of obtaining control over the character and use of buildings fronting on an improvement should be weighed against that of other means of accomplishing the same result—restricting the height of buildings, segregating buildings according to occupancy and prescribing building lines. The police powers so exercised may at times serve the same purpose as excess condemnation and be resorted to in place of it.

* * * * *

Recoupment must be viewed rather as an incident in the achievement of a large social and political program than as an end in and by itself. * * * The aims of excess condemnation are something more than mere pecuniary profit. Its conducement to civic beauty by regulating the elevations and facades of buildings, its promotion and encouragement of commercial and business development by affording sites of shape and size suitable to the erection of structures comporting with the potential importance and use of the city's thoroughfares, and the light, air and unobstructed view admitted to parks, parkways and playgrounds, are assets not subject to capitalization. Their value must be sought in the increased convenience and well-being of the community."

Mr. Swan, in an article in The American City in 1916* summarized his report mentioned above, and said:

"The case of excess condemnation rests primarily upon two considerations—the replotting of remnants and the control of land adjacent to improvements."

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* "Excess Condemnation in Street Improvements," 14 Am. City 258-262. The quotation above is from page 258.

In 1916, in the volume of essays on "City Planning," edited by John Nolen,* appeared a brief account of excess condemnation, written by Flavel Shurtleff. He deals only with the recoupment feature, which he does not favor, and says nothing about the replotting or protective motives. He says, in part, of excess condemnation:

> "Its value as a financial expedient has hardly been tested in America, and the principle of the amendment is so contrary to the spirit of individual rights that rapid headway cannot be expected in view of the litigation which will follow its use. * * * The city is really something of a speculator. * * * It appears from a parliamentary inquiry on the subject in England that the consensus of those best informed was against its use for purposes of recoupment alone."

The volume by Charles Mulford Robinson, on "City Planning,* which also appeared in 1916, contains a chapter on excess condemnation. It reviews the history, advantages and dangers, quotes Walter L. Fisher and Flavel Shurtleff, and pronounces no particular conclusion, beyond an indication that replotting may be a justification for excess condemnation.

The first and only full volume on excess condemnation which has ever appeared in the United

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* "City Planning," edited by John Nolen. Being a volume of the National Municipal League Series. Sub-octavo, 447 pages. D. Appleton & Co., New York, 1916. Biographies of contributors in front pages. An account of Mr. Nolen may be obtained from Who's Who in America. Mr. Shurtleff has previously been mentioned and quoted herein. His chapter is entitled "City Financing and Planning," and the quotation relative to excess condemnation is from page 397. A second edition was published in 1929.

* "City Planning, with special reference to the Planning of Streets and Lots," by Charles Mulford Robinson. Octavo, 344 pages. G. P. Putnam's Sons, New York, 1916. The chapter on "Excess Condemnation" is at pages 255-264.

States, so far as we can learn, was published in 1917.* The author was Robert Eugene Cushman, instructor in political science in the University of Illinois. He devotes a chapter to the constitutionality of excess condemnation, and concludes:

> "In the light of these facts it seems fair to assume that the judgment of the Supreme Court upon the constitutionality of excess condemnation will depend upon the purpose for which that policy is used. If the only motive for the application of that scheme was to secure to the city treasury the profit which might accrue from the resale of the surplus land taken it could probably be argued with much cogency that the financial need of the city did not constitute a public purpose of the kind which would justify the condemnation of the land of particular citizens, and that the use of eminent domain for that purpose was a denial of the equal protection of the laws and a deprivation of property without due process of law.
>
> There seems, however, to be nothing in the utterances of the Supreme Court thus far which would preclude its adopting the view that the effective replotting of remnants of land otherwise unusable and the adequate protection of the beauty, health and usefulness of improvements admittedly public in character are objects so important to the community welfare as to render the use of excess condemnation for those purposes a justifiable exercise of the right of eminent domain."

---

* "Excess Condemnation," by Robert Eugene Cushman. Being a volume of the National Municipal League series. Sub-octavo, 323 pages. D. Appleton & Co., New York, 1917. Contains a bibliography, discussion of merits and demerits, history of excess condemnation especially in its legal aspects, and other valuable material. The chapter on constitutionality appears at pages 275-310, and the quotation is of its last two paragraphs, page 310.

In 1918 the Chicago Bureau of Public Efficiency published its pamphlet on excess condemnation*, urging that it be provided by amendment of the Illinois constitution. Chief stress is laid on the replotting motive, although the protective and recoupment motives are recognized and not disapproved. The thirteen maps showing remnants left in some street changes actually made in Chicago, and in some proposed street changes, afford a valuable supplement to the graphic illustrations by Swan and Purdy, already referred to, of similar results in New York City. These illustrations, and the text, indicate the emphasis on the remnant or replotting motive. As to the recoupment motive, the pamphlet says at page 52:

> "From the financial standpoint, it is doubtful whether European cities have been able to secure as effective results in defraying the cost of street improvements by acquiring surplus lands through condemnation proceedings and then selling them after the improvement has been made as Chicago and other American cities have been able to secure by the special assessment plan. However, in some of the recent larger improvements the London County Council has combined the special assessment system with excess condemnation with very satisfactory results."

Herbert W. Swan reviewed the foregoing report of the Chicago Bureau, and said in part:*

> "Such excess takings of land as are necessary to obtain an economic replotting of

---

* "Excess Condemnation. Why the City of Chicago should have the power in making public improvements, to take property in excess of actual requirements. Lessons to be drawn from certain unfortunate aspects of the Twelfth Street and Michigan Avenue widening projects and the proposed Ogden Avenue Extension." Report prepared by the Chicago Bureau of Public Efficiency, September, 1918. Pamphlet, 58 pages.

* "Excess Condemnation," an article appearing in 8 Nat. Mun. Rev. 174-175, in the year 1919.

> the new frontage constitute good business practice even though they may sometimes have to be executed at a financial loss to the municipality.
>
> The primary object of a street improvement is not to make it absolutely impossible to use the adjoining property—as one might mistakenly suppose upon viewing the extension of Seventh Avenue, New York, Fairmount Parkway, Philadelphia, or Twelfth Street, Chicago—but to facilitate the movement of city traffic by providing new or wider thoroughfares. Were we of a cynical disposition we might ask whether it were not better that the erstwhile village streets should choke with metropolitan traffic than that the appearance of the city should be forever marred and ruined as a result of improvements executed without regard to the replottage of contiguous and neighboring land."

In 1923 the National Municipal League, as publisher, and Mr. Lawson Purdy, as author, contributed to the literature of excess condemnation a small but excellent pamphlet.*

One other contribution should be noticed. In January, 1925, at the annual meeting of the American Society of Civil Engineers, an entire afternoon was devoted to excess condemnation and its relation to various phases of city planning. The material so presented was reported in the American City Magazine for the following month.*

On that occasion Mr. Frank B. Williams said, in part:

---

* "Why we need Excess Condemnation," by Lawson Purdy. Reprinted from National Municipal Review for July, 1923, Vol. XII. Pamphlet, 8 pages. For an account of Lawson Purdy, see Who's Who in N. Y.; also Who's Who in America.

* 32 Am. City 125-127. Feb., 1925. "The Use of Excess Condemnation in the Opening and Widening of Streets."

> "The practical man realizes that the development of the land outside the lines of the given improvement, so as to harmonize with the improvement within them, is essential to the attainment of the maximum usefulness of that improvement. In short, he knows that the outside land—not in fact 'excess'—is needed for the improvement. * * * In the United States excess condemnation is not needed, as it is abroad, for the recoupment of expense to be obtained by it; in this country these advantages can be obtained by imposing local assessments on those specially benefited. * * * Excess condemnation is needed for the harmonious planning and subsequent development of the land within and just outside the lines of the main development; and for this there is no substitute for excess condemnation."

At this same meeting, Mr. Arthur L. Vedder, Deputy Superintendent of City Planning in Rochester, N. Y., contributed some interesting information about the actual use of excess condemnation in that city. He said it had been used, "*in numerous instances*", four of which he illustrated by maps and explanations published in the article referred to. Were it practicable, these would be reproduced.

Aside from the maps and photographs, this concludes our presentation of data toward a history of excess condemnation in the United States. What conclusions this data may justify, are to be presented elsewhere.

HENRY S. MANLEY.

Albany, N. Y.
January 23, 1930.

NOTE:

The photographs and maps which follow, are taken from a report on Excess Condemnation prepared by Herbert S. Swan for the National Municipal League in 1915. From the following language, appearing therein at page 13 we conclude that the same material was used before the New York Legislature when it was persuaded to adopt the constitutional amendment in 1912 and 1913:

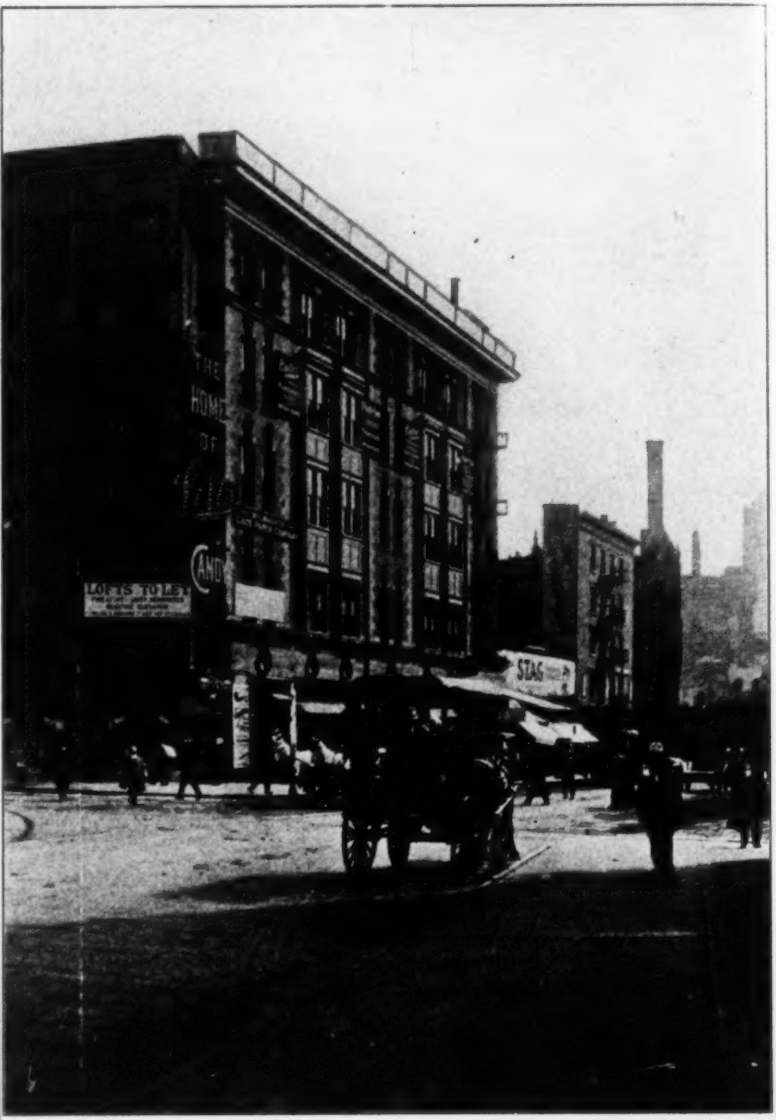
> "The maps used by Mr. Lawson Purdy before a committee of the New York Assembly at Albany in advocating the adoption of a resolution to amend the Constitution so as to authorize excess condemnation, demonstrate this advantage resulting from excess condemnation more eloquently than any words. The writer is indebted to Mr. Purdy for the maps and photographs used in this report to illustrate New York conditions."

PHOTOGRAPHS AND MAPS SHOWING OPERATION OF SYSTEM HERETOFORE USED IN NEW YORK.

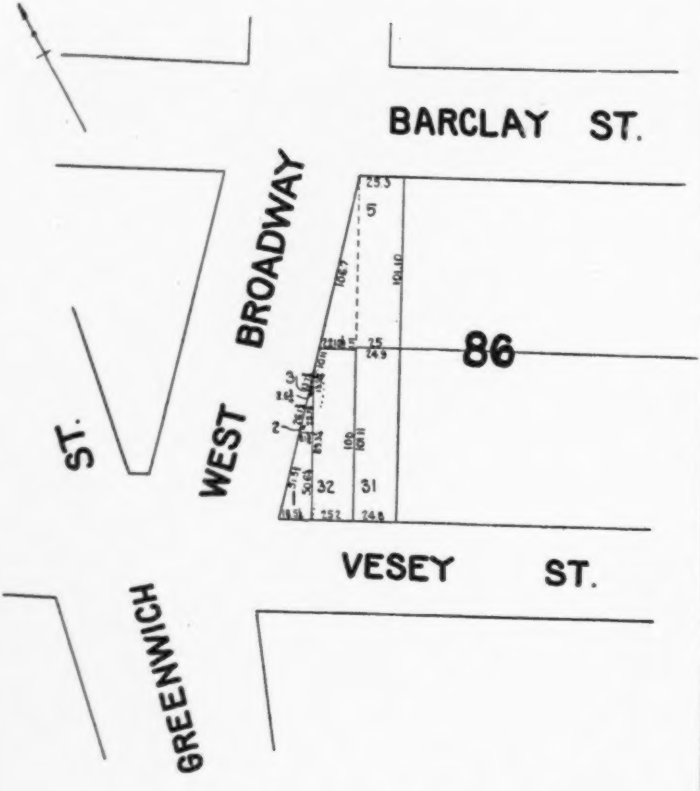
EXPLANATORY NOTE.

These photographs and maps were prepared to show some of the results of the system of condemnation heretofore used in the absence of the power of excess condemnation. They indicate the damaged and unusable condition of lots mutilated by the improvement and lots so situated that appropriate buildings could not be erected. They were prepared under the direction of the Department of Taxes and Assessments by Mr. John A. R. Duntze, of that department.

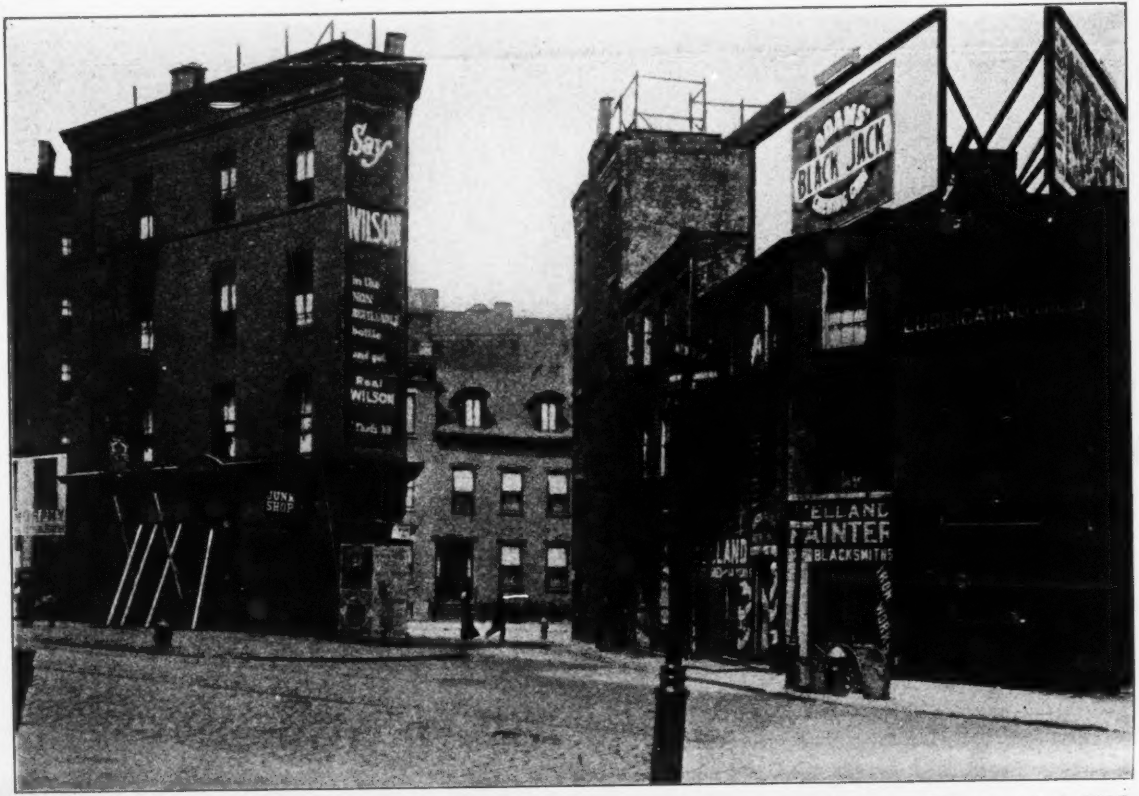
BLOCK 86—EAST SIDE OF WEST BROADWAY, BETWEEN BARCLAY AND VESEY STREETS


THE
HOME
OF
CANDY
LOFTS TO LET
STAG

Widened 1894 Photographed 1915

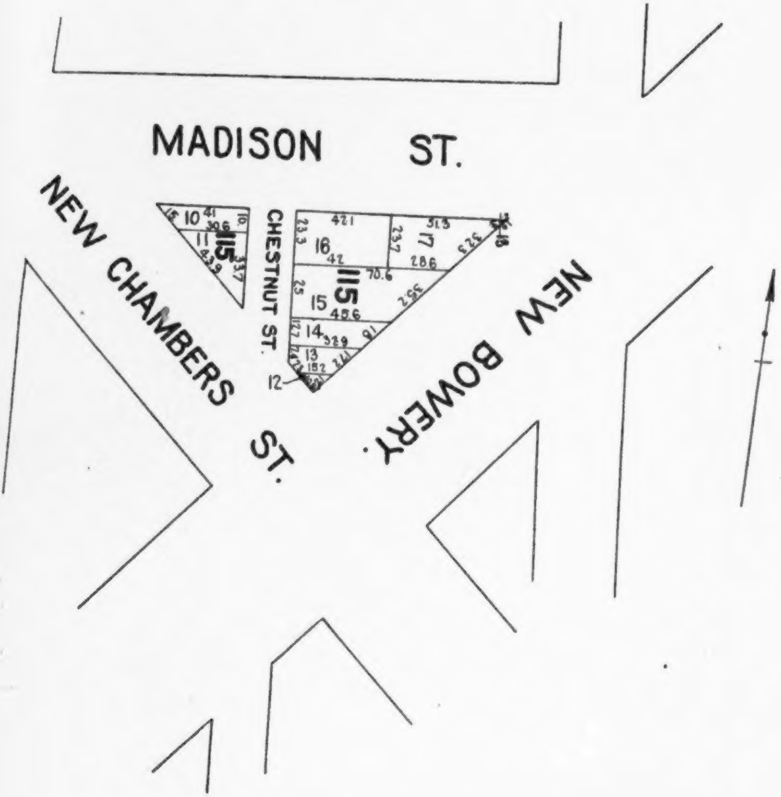

BARCLAY ST.
WEST BROADWAY
GREENWICH ST.
VESEY ST.
86
25.3
5
106.7
101.10
25
24.9
3
2
100
101.11
32
31
1
25.2
24.8

BLOCK 11[illegible] NEW CHAMBERS STREET, BETWEEN MADISON STREET AND NEW BOWERY; NEW BOWERY, BETWEEN MADISON STREET AND NEW CHAMBERS STREET

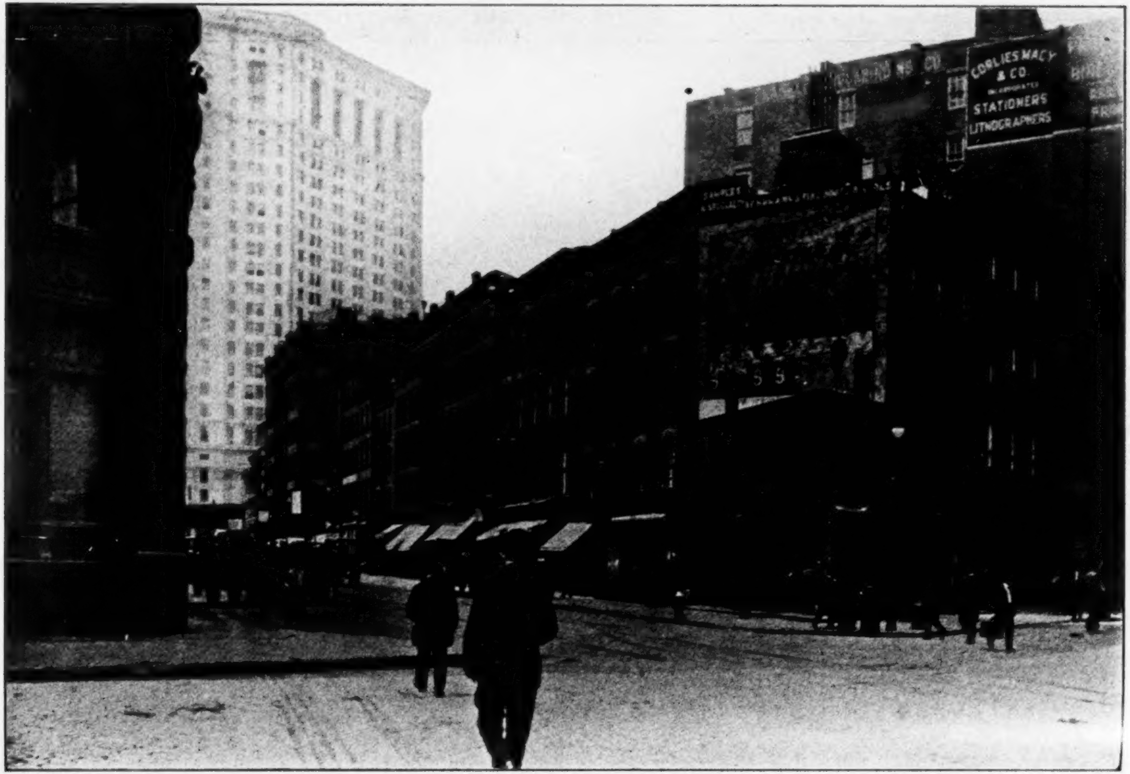

Say
WILSON
Real WILSON
JUNK SHOP
ADAMS' BLACK JACK
ELLAND
PAINTER
BLACKSMITHS
IRON WORKS

Widened 1856

Photographed 1915

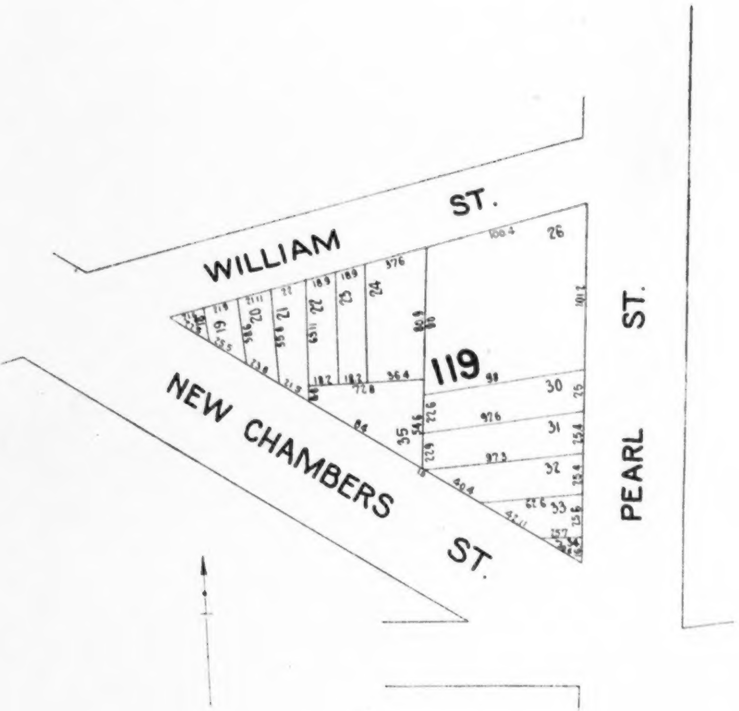

MADISON ST.
NEW CHAMBERS ST.
CHESTNUT ST.
NEW BOWERY.
115
115
10
11
12
13
14
15
16
17
18
41
30.6
43.9
33.7
42.1
23.3
42
70.6
23.7
31.3
28.6
32.5
25
45.6
35.2
14
32.9
19
13
15.2
17.7

BLOCK [illegible] NORTH SIDE OF NEW CHAMBERS STREET, BETWEEN WILLIAM AND PEARL STREETS


CORLIES MACY
& CO.
INCORPORATED
STATIONERS
LITHOGRAPHERS

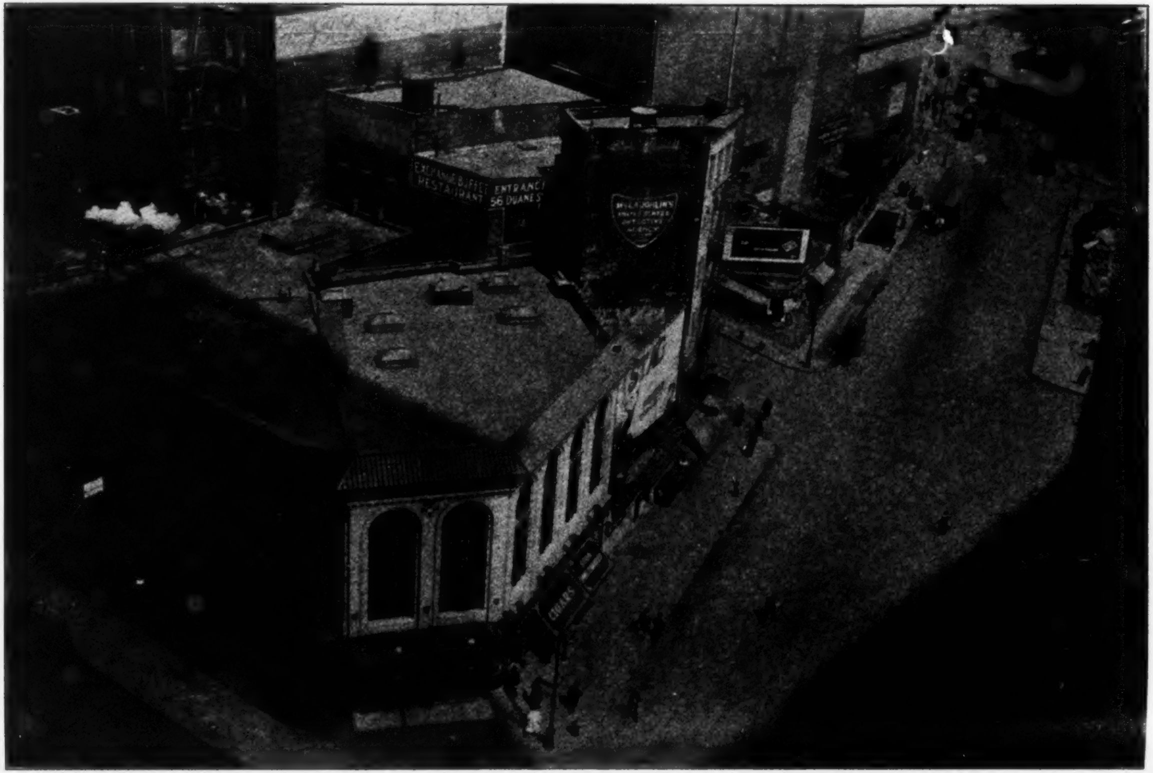
Widened 1856

Photographed 1915


WILLIAM ST.
NEW CHAMBERS ST.
PEARL ST.
119
19
20
21
22
23
24
26
30
31
32
33
35
100.4
37.6
101.2
97.6
97.3
40.4
36.4
72.8
25.5
25.4
25.6

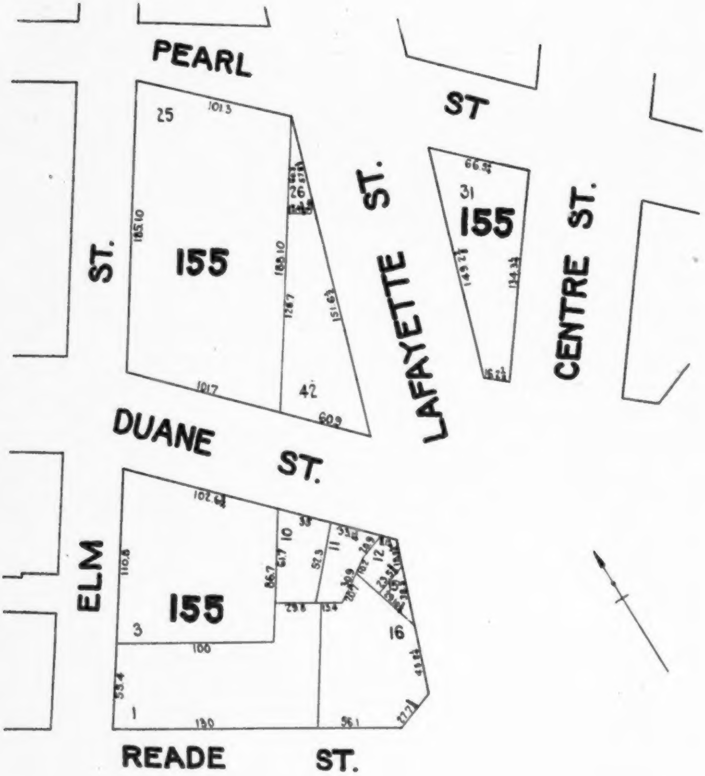
BLOCK 155—WEST SIDE OF LAFAYETTE STREET, BETWEEN READE AND PEARL STREETS

This view taken from 9th Floor Municipal Building

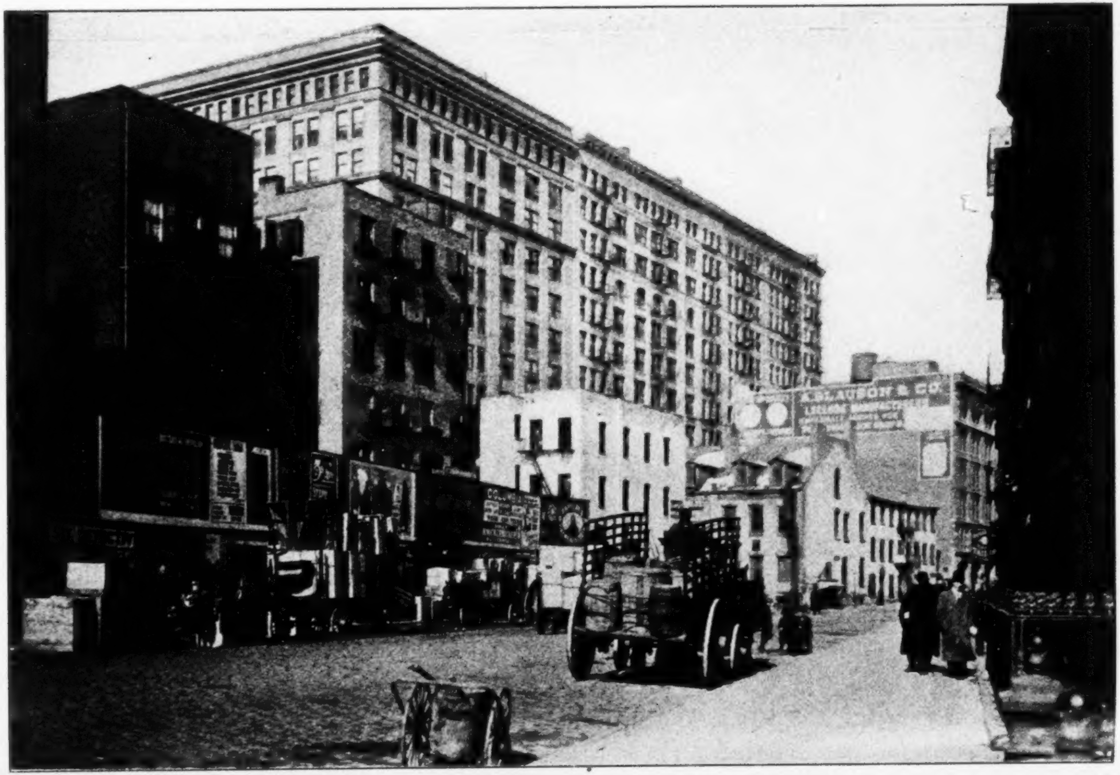

EXCHANGE BUFFET RESTAURANT
ENTRANCE 56 DUANE ST
CIGARS

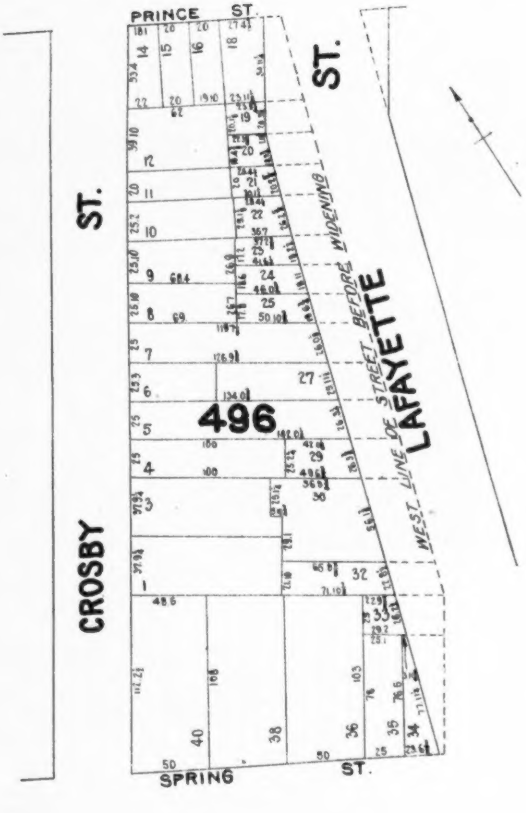
Widened 1903

Photographed 1915

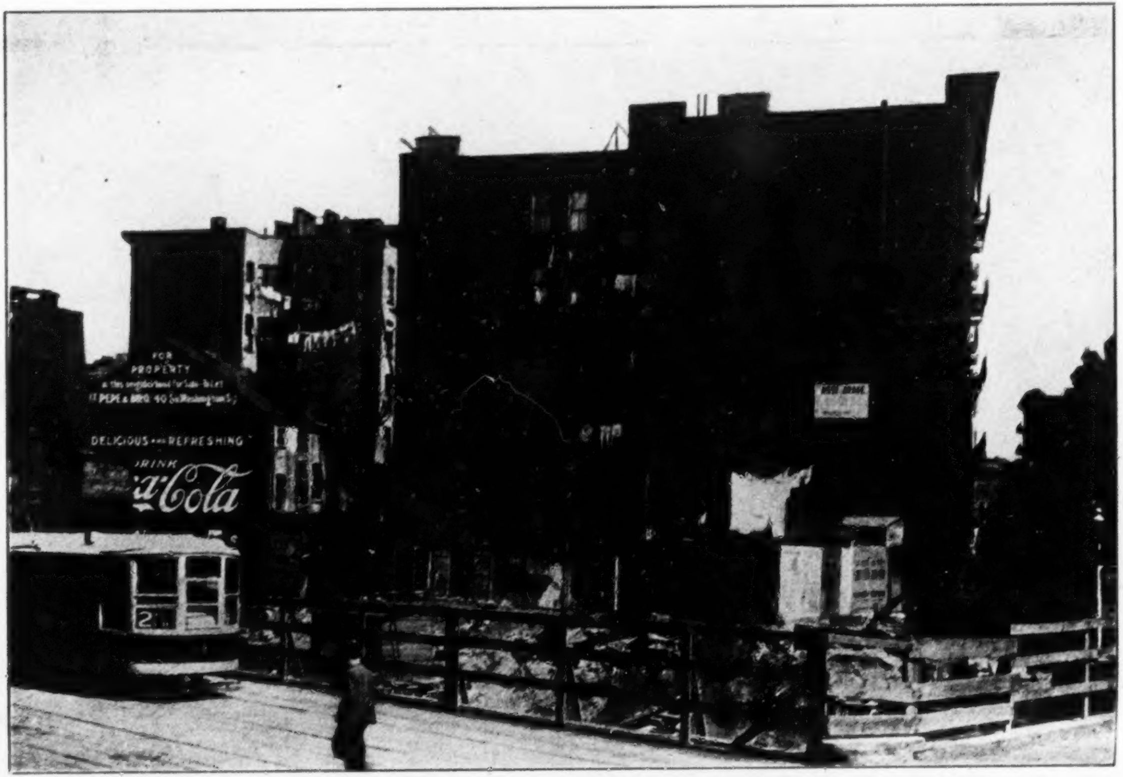

PEARL
ST
ST.
LAFAYETTE
ST.
CENTRE ST.
DUANE
ST.
ELM
ST.
READE
ST.
155
155
155
25
26
42
31
3
1
10
11
12
16
101.3
185.10
188.10
126.7
151.63
101.7
60.9
66.56
149.27
134.34
16.23
102.63
110.8
86.7
61.7
33
52.3
33.6
29.8
13.4
100
53.4
130
56.1
41.85
22.71

BLOCK 496—WEST SIDE OF LAFAYETTE STREET, BETWEEN SPRING AND PRINCE STREETS



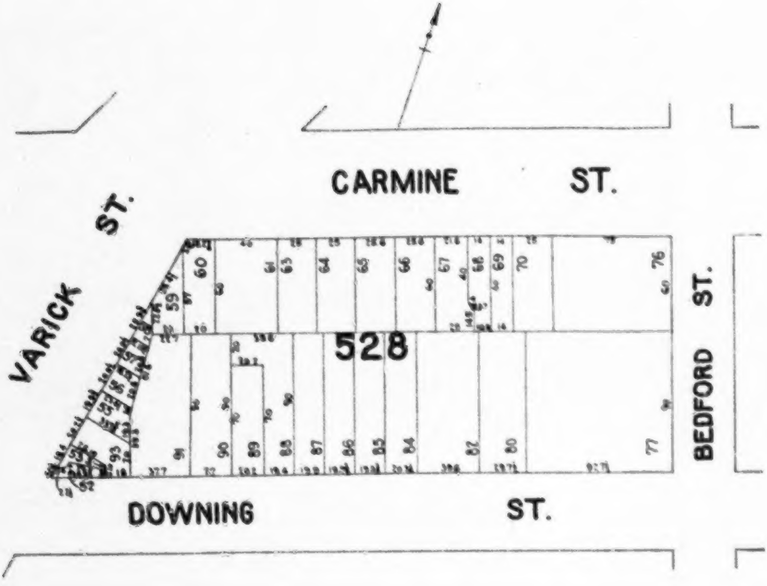

PRINCE ST.
CROSBY ST.
LAFAYETTE ST.
SPRING ST.
496
WEST LINE OF STREET BEFORE WIDENING
1
3
4
5
6
7
8
9
10
11
12
14
15
16
18
19
20
21
22
23
24
25
27
29
30
32
33
34
35
36
38
40

BLOCK 528—EAST SIDE OF VARICK STREET, BETWEEN DOWNING AND CARMINE STREETS

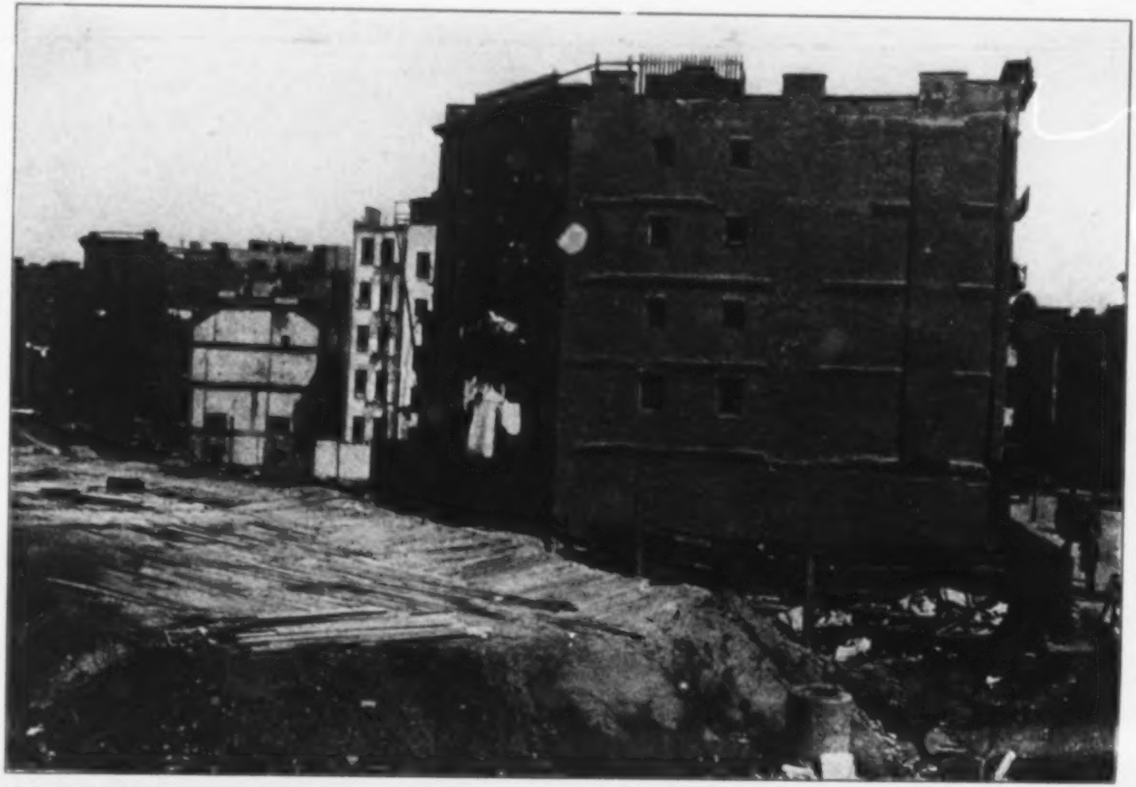

FOR
PROPERTY
PEPE & BRO. 40
DELICIOUS AND REFRESHING
DRINK
Coca-Cola
2

Widened 1913

Photographed 1915


CARMINE ST.
VARICK ST.
BEDFORD ST.
DOWNING ST.
528
60
59
61
63
64
65
66
67
68
69
70
76
91
90
89
88
87
86
85
84
82
80
77
93
52

BLOCK 582—EAST SIDE OF SEVENTH AVENUE, BETWEEN CARMINE AND LEROY STREETS

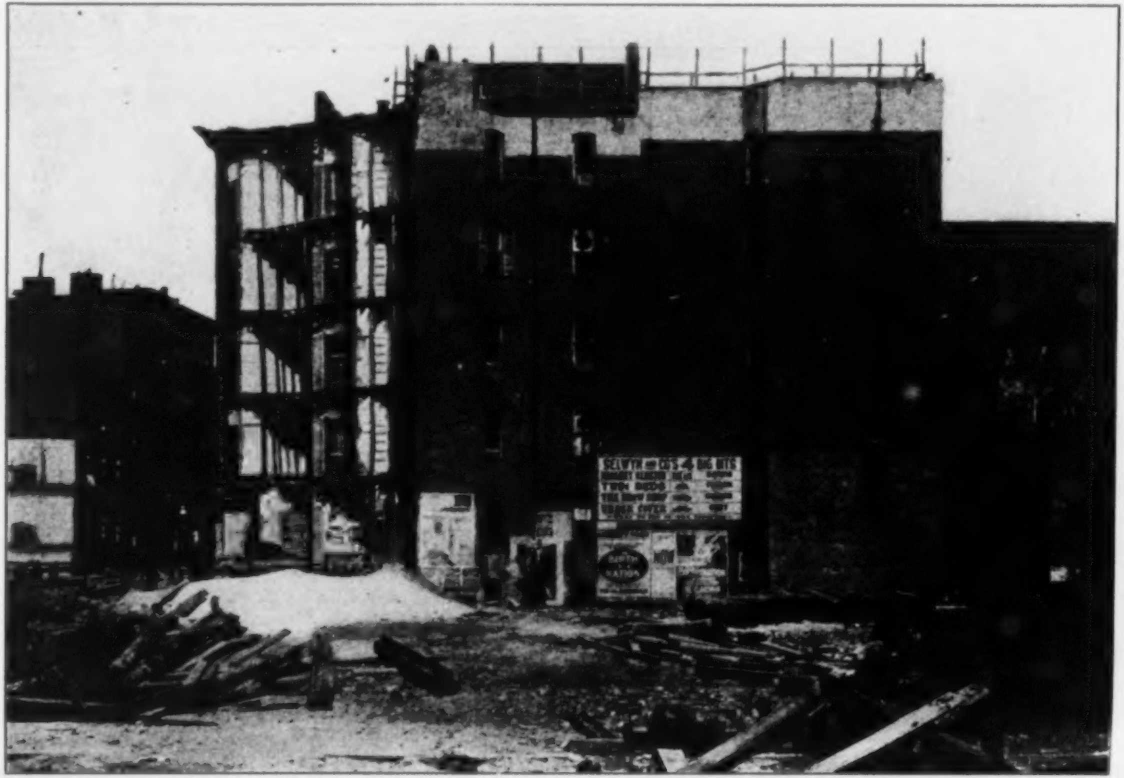


Widened 1913

Photographed 1915

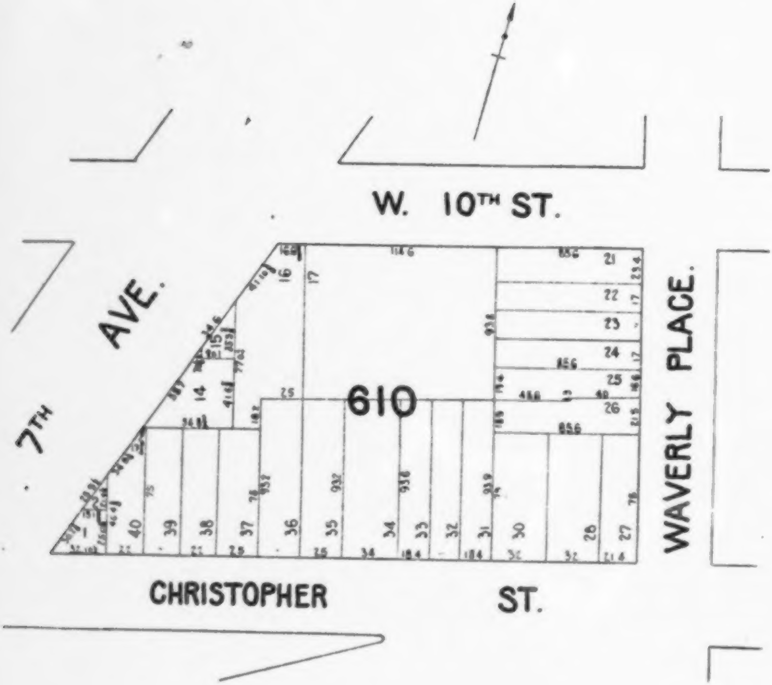
LEROY ST.
7TH AVE.
BEDFORD ST.
CARMINE ST.
582
25
26
27
28
29
30
31
32
34
35
36
37
38
39
40
41
42
43
44
45

BLOCK 610—EAST SIDE OF SEVENTH AVENUE, BETWEEN CHRISTOPHER AND WEST TENTH STREETS

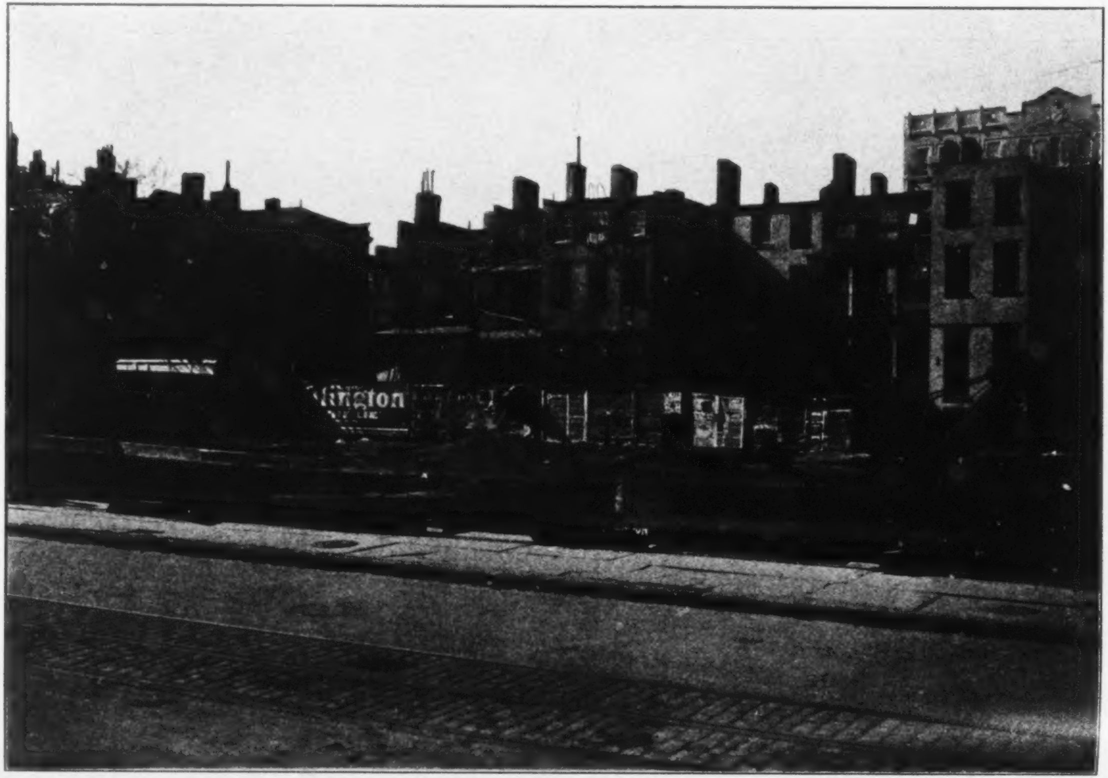

SELWYN
CO'S 4 BIG HITS
TWIN BEDS
UNDER COVER

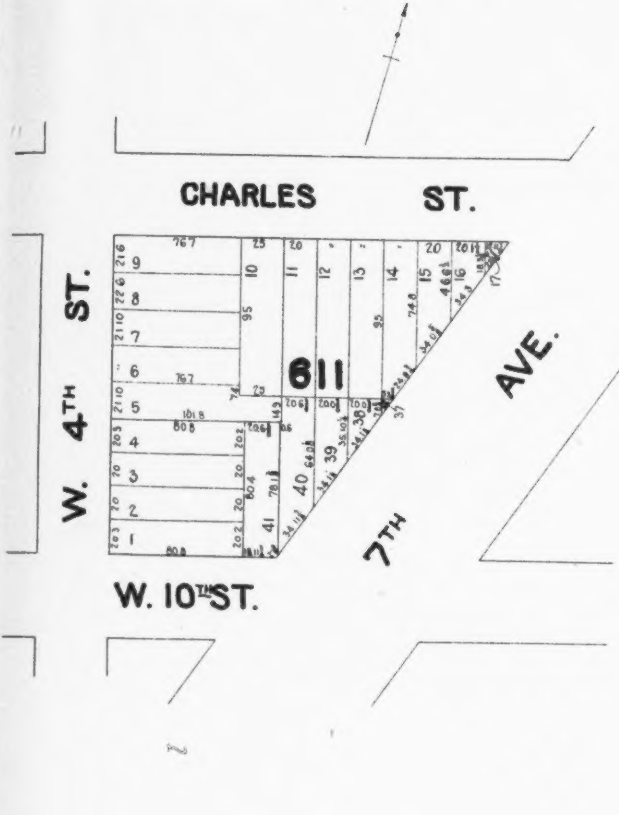
Widened 1913

Photographed 1915


W. 10TH ST.
7TH AVE.
WAVERLY PLACE.
CHRISTOPHER ST.
610
16
17
14
15
21
22
23
24
25
26
27
28
30
31
32
33
34
35
36
37
38
39
40

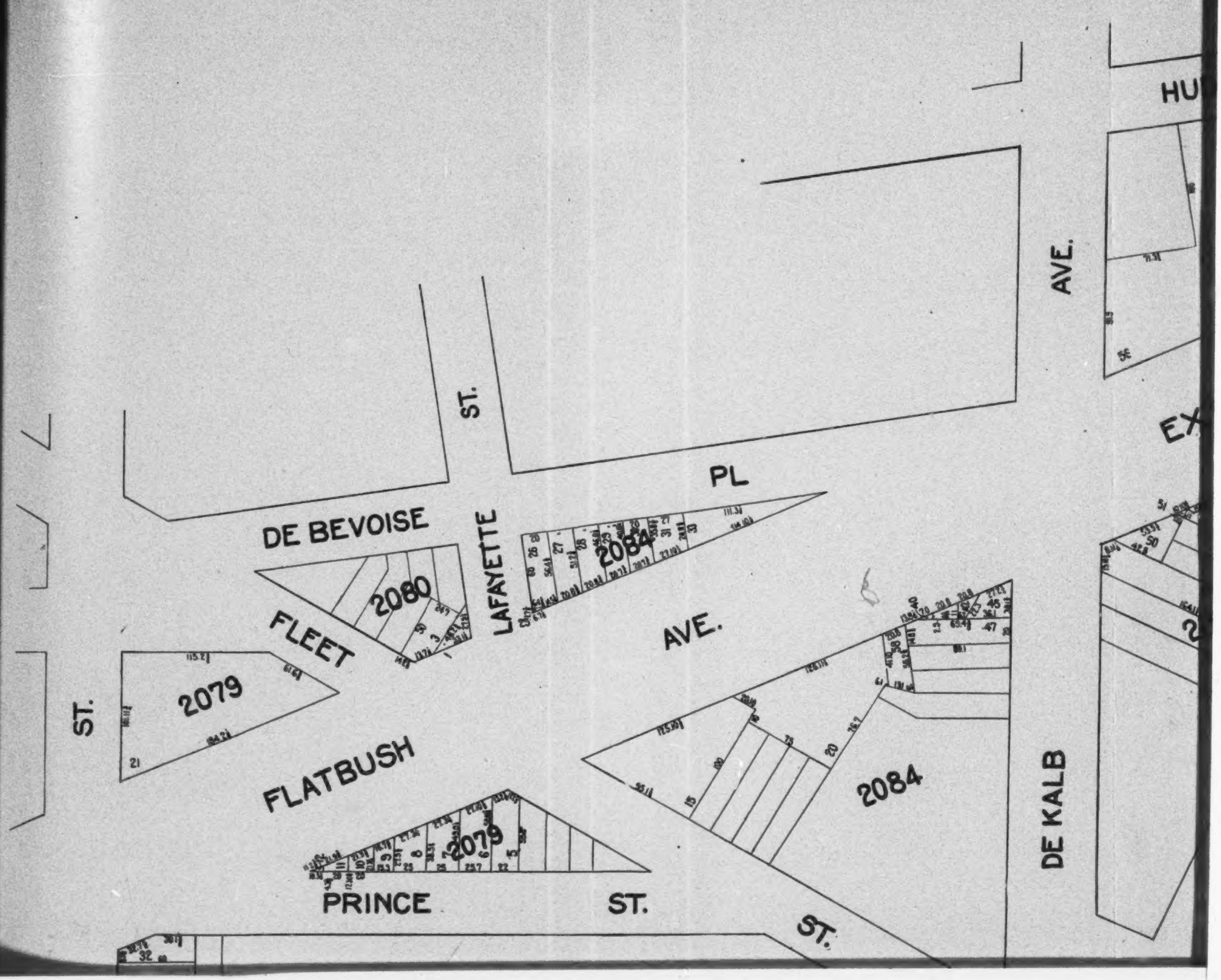
BLOCK 611—WEST SIDE OF SEVENTH AVENUE, BETWEEN WEST TENTH AND CHARLES STREETS




CHARLES ST.
W. 4TH ST.
W. 10TH ST.
7TH AVE.
611
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
38
39
40
41

FLATBUSH AVENUE EXTENSION

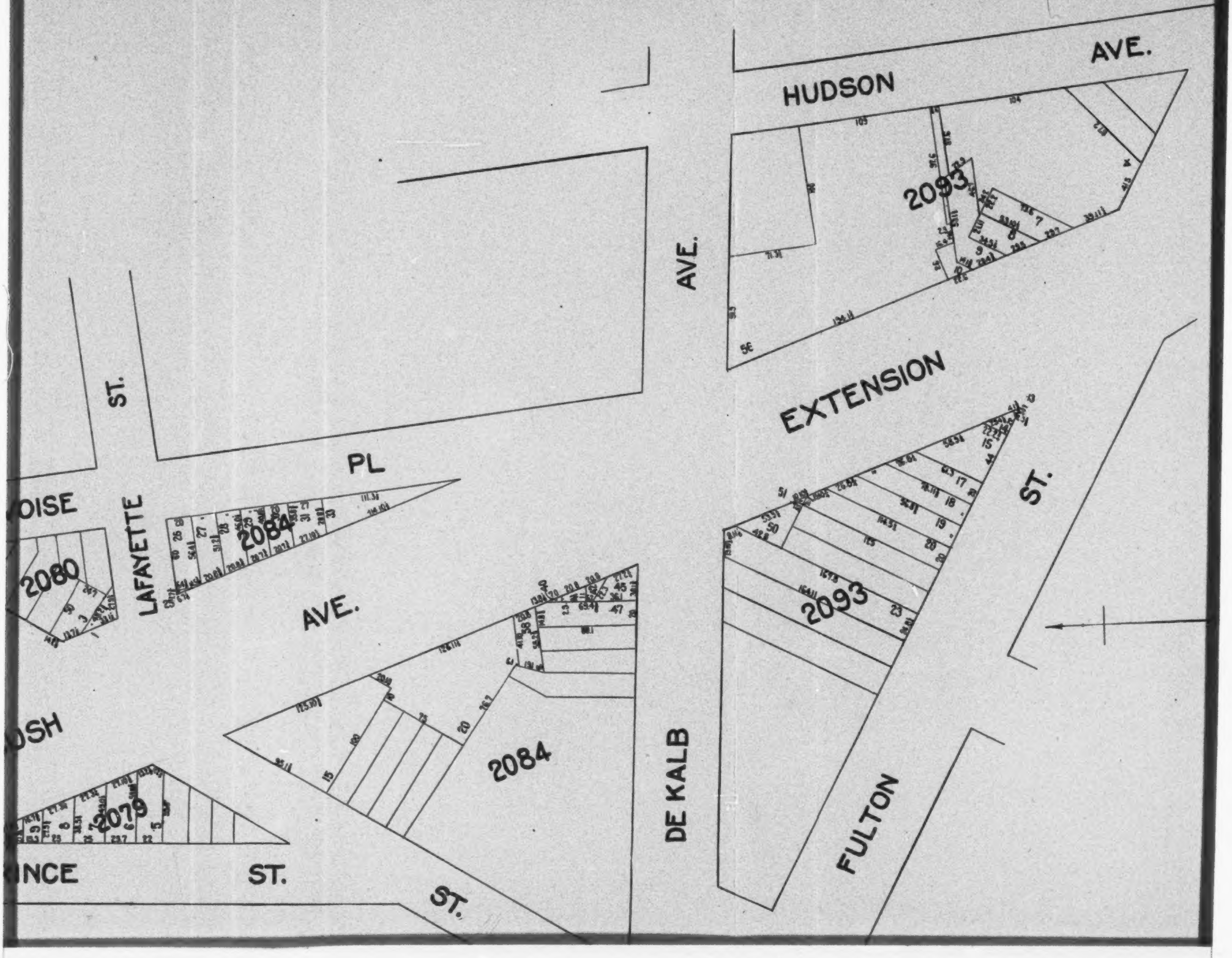
(See page 40 for reference to this street extension.)



HU
AVE.
ST.
PL
DE BEVOISE
LAFAYETTE
2084
2080
FLEET
AVE.
EX
2079
ST.
FLATBUSH
2084
2079
DE KALB
PRINCE
ST.
ST.

FLATBUSH AVENUE EXTENSION

(See page 40 for reference to this street extension.)


HUDSON AVE.
AVE.
2093
EXTENSION
ST.
PL
LAFAYETTE
OISE
2084
2080
AVE.
USH
2079
INCE ST.
ST.
2084
DE KALB
2093
FULTON
ST.

FILE COPY

Office Supreme Court,
FILED
APR 21 193
CHARLES ELMORE CR
CL

IN THE

Supreme Court of the United States

The City of Cincinnati, a Municipal Corporation,
Petitioner,
vs.
Margaret W. Vester,
Respondent.
No. 372.

The City of Cincinnati, a Municipal Corporation,
Petitioner,
vs.
James S. Richards and Paschal L. Richards,
Respondents.
No. 373.

The City of Cincinnati, a Municipal Corporation,
Petitioner,
vs.
Llewellyn B. Reakirt,
Respondent.
No. 374.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

GILBERT BETTMAN,
Attorney General.

L. F. LAYLIN,
Of Counsel.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

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Rindge Co. v Los Angeles County, 262 U. S., 700.... 15

IN THE

Supreme Court of the United States

The City of Cincinnati, a Municipal Corporation, Petitioner, vs. Margaret W. Vester, Respondent.	No. 372.
The City of Cincinnati, a Municipal Corporation, Petitioner, vs. James S. Richards and Paschal L. Richards, Respondents.	No. 373.
The City of Cincinnati, a Municipal Corporation, Petitioner, vs. Llewellyn B. Reakirt, Respondent.	No. 374.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The undersigned, as attorney general of the state of Ohio, respectfully moves this Honorable Court for leave to file on behalf of the state of Ohio the accompanying brief in these cases as amicus curiae.

GILBERT BETTMAN,
Attorney General of the State of Ohio.

L. F. LAYLIN,
Of Counsel.

BRIEF OF GILBERT BETTMAN, ATTORNEY GENERAL OF OHIO, AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

In the present cases the validity of Section 10 of Article XVIII of the Constitution of Ohio is directly attacked. While it is true that both of the lower courts were careful to deny that this constitutional provision is wholly without effective force, it is idle to argue that, if the decision of the courts below be permitted to stand, the right of excess condemnation, which the people of Ohio have attempted to vest in their municipal governments is not practically denied. Wherever the people of a sovereign state in the most solemn way available to them have expressed their will, and that will is the subject of attack as violative of private rights guaranteed by the Constitution of the United States, it becomes not only the right, but also the duty, of the chief law officer of the state to appear.

THE FACTS.

It would be work of supererogation to review the facts in the three cases here under consideration. The details are fully and exhaustively considered in the briefs presented by other counsel in the case. The wisdom and propriety of the appropriations are matters in which the state, as distinguished from the city, is not particularly concerned. The sole consideration of this brief is to attempt to sustain the power of appropriation, hence no attempt will here be made to discuss the merits of the individual cases nor will the facts be set forth, except as to such incidental comment as may be necessary in the course of the argument.

ARGUMENT.

This is the first opportunity that this court has had for passing upon the validity of excess condemnation of property in connection with the construction of a public improvement. It is not unusual, however, for judicial inquiry into the validity of a certain mode of procedure to lag behind the recognition of that mode by popular will and legislative enactment. The principle of excess condemnation may rightfully be said to be novel so far as any widespread recognition is concerned. That there are many historical instances in which the principle has been applied is revealed in the brief on behalf of the petitioner. Only in compartively recent years, however, has that principle become embedded in the fundamental law of a sovereign state.

Historical analysis of the development of the principle leads to the conclusion that those states, eight in number, which have incorporated provisions in their Constitution authorizing excess condemnation, were for the most part actuated so to do by reason of court decisions rendering invalid excess appropriation on the ground that certain provisions of the constitutions of the respective states had been violated. It is an interesting commentary upon the force of the public opinion favoring the exercise of this right that the people of these eight states were not to be frustrated but, feeling so keenly the necessity for the application of the principle in modern urban development, by express constitutional provisions removed the obstacles in their path. It remains to be seen whether any provision of the Constitution of the United States stands in the way of the accomplishment of this purpose which is evidently so much desired.

The main attack upon the validity of the proceedings of these cases is based upon the fact that they are violative of the provisions of the Fourteenth Amendment of the Constitution in that the respondents are being deprived of their properties without due process of law. It must be conceded, of course, that the statutes providing the method of determining the value of property and the method of payment of compensation for property taken for public purpose afford due process. That question can no longer be regarded as open. It must further be conceded that the necessity of appropriation is a legislative and not a judicial question. The sole remaining question is whether the purpose is public and that, according to previous decisions of this court, is justiciable. It becomes necessary, accordingly, to examine these cases to determine whether the purpose actuating the legislative body of Cincinnati is public.

It is perhaps difficult for those residing in the city of Washington and enjoying the fruits of the inspired work of Major L'Enfant to appreciate the problems and difficulties confronting many of our American cities in their efforts to provide their inhabitants with a better place in which to live. The perhaps excusable lack of vision of the original incorporators, the avarice of real estate speculators, and like causes have occasioned hundreds of millions of dollars of public expenditures in recent years to correct the errors of the past. There has arisen a civic consciousness of community needs in furtherance of the public welfare far beyond the most enlightened conception of fifty years ago or even twenty-five years ago.

Possibly the most urgent problem confronting American cities today is that of providing adequate thoroughfares for the tremendous volume of traffic which must be handled. Streets which, before the advent of the automobile, were regarded as almost boulevards, are pitiably ineffective to cope with present day vehicular traffic. It is regrettable but true that, where the necessity most exists, the expense of making the improvement is the greatest. In congested areas demanding relief, property values are the highest and property is most fully and completely utilized. Substantial buildings, as a rule, are found flush with the street line and any widening of the thoroughfare means their practical destruction, although but a comparatively small percentage of the real estate be taken. Oftentimes the improvement contemplated leaves comparatively small irregular pieces of property if only so much property as is actually to be occupied by the improvement is taken. The small parcels are unfit for development or use appropriate to the type of the improvement made and their existence inevitably retards all development of adjacent private property and hence detracts from the usefulness of the improvement itself. Their intrinsic value is far exceeded by their nuisance value.

Realizing that an improvement of this character must fail in the accomplishment of its complete purpose if provision could not be made for the proper development of adjacent property, those interested in proper civic development conceived the principle of excess condemnation which, while giving to private property owners full compensation for any interest taken, yet enabled the municipalities, by the acquisition of additional property, to so readjust property lines adjacent to the improvement as to insure its full and complete development in a way appropriate to the improvement made. It is thus to be seen that, at least as ordinarily applied, excess condemnation is used by those who are actuated solely by motives of a public character. As has heretofore been stated, the primary question for consideration by this court in connection with the application of the Fourteenth Amendment is whether or not the real purpose is public. Ordinarily this question may be answered by a determination of whether this purpose is private.

The court will scan in vain the record in these cases for any indication that the appropriations sought to be made are in reality in furtherance of a private, as distinguished from a public, purpose. It is not the taking of A's land for the sole purpose of turning it over to B. While, in the end, B may acquire A's property, A would be paid full value therefor and presumably B, likewise, would be compelled to pay its reasonable worth after the improvement is made, and the property itself will, if the avowed intention of the city be fulfilled, be transmuted by rearrangement of lot lines into an essentially different property than that originally owned by A. It is this readjustment of property lines, together with restrictions where appropriate, that constitutes the public purpose which is the justification for the taking in furtherance of the improvement. The real purpose in view is the accomplishment of a public improvement, and the acquisition of excess land and its subsequent disposition after rearrangement is but incidental to the accomplishment of the major result. If that result may only be attained by such means, then surely the land is taken "for public use", although that use entails the resale of the property in such form as best to further the major object.

Both lower courts give guarded recognition to the right of a municipality to acquire the remnant of a parcel which may be left where substantially all of a given parcel is taken, so that the cost of acquiring what is actually needed amounts to practically the entire value of the whole tract. Both courts, however, deny that in any one of these three cases the principle may be applied. It is respectfully submitted that in both the Richards and Reakirt cases the record is undisputed that the actual improvement will occupy a part of the tract taken. This being conceded, it must further be conceded that the decision of the lower courts was grounded upon the **necessity** of taking and it has been uniformly recognized by this court that the necessity is purely a legislative question and accordingly not justiciable. Manifestly, the lower courts erred in conceding the right to take remnants at all and then denying the necessity with respect to the particular remnants here involved.

The Vester case is of a different character. It is there proposed to take a lot which does not abut upon the improvement at all. The lots at that particular point front upon Broadway rather than Fifth street, which is the street being widened. The 25 feet necessary for the actual improvement leaves a very narrow lot fronting on Broadway, with a depth of 90 feet on Fifth street. It is proposed to take this narrow lot and also the two succeeding lots fronting upon Broadway with the obvious purpose in view of readjusting lot lines facing Fifth street.

The question here presented is, therefore, whether, in providing against the existence of unusable parcels of land immediately adjacent to the improvement, the city may appropriate property not abutting thereon and join parcels together so as to create appropriate sites for improvements in harmony with the character of the public improvement in view.

If the right of excess condemnation under the so-called remnant theory is not to be entirely emasculated, then clearly the right to take the property involved in the Vester case must exist. Of little benefit would it be to the city to acquire remnants unsuitable for use were it not also privileged to acquire additional property with which it may combine the remnants into usable tracts of ground for ultimate disposition. If this right be not accorded, then the only purpose served in permitting excess condemnation at all is that of economy. The District Court (Rec., p. 30) holds that where substantial improvements are destroyed and a substantial portion of the land taken so that the land and the value of the improvements would substantially equal the total value of the property, the city should have the right to take all. He also concedes that, under those circumstances, the city may legitimately recoup itself by the sale of the remaining parcels. If, however, those parcels be not usable, then plainly there is an economic restriction upon the resale thereof, and, in practical effect, the only advantage gained is that of recoupment. The development of property along the improvement, which is an essential feature of the justification of excess condemnation, is not subserved. In order that the full public benefit of the condemnation of remnants may be had, it is absolutely essential that the city be entitled to take property in addition to those remnants which are left as the result of taking that property which is necessary for the actual construction of the improvement.

It is here argued, and so found by the Circuit Court of Appeals, that in each of these cases the sole object in the appropriation was to recoup to the city some cost of the improvement. It is submitted that the facts in these cases do not justify this conclusion. Assuming, however, that recoupment is the sole motive, does that fact necessarily render the proceedings invalid? It is respectfully submitted that it does not.

Condemnation of property must be for a public purpose. Recoupment obviously means getting back a certain portion of an expenditure already made. The expenditure in a case of this kind is that of public money and accordingly recoupment is a saving of public funds. So when public officials of a municipality acquire the property in question for the purpose of saving public money, manifestly it is done for a public purpose. Is it not true that the **taking** of the property and not necessarily its ultimate use, must be for a public purpose? By its acquisition and subsequent resale, a vital public purpose has been served. It may be urged that mere economy does not constitute justification for taking private property. Economy in the administration of public affairs should surely not be discouraged and when that economy is effected by making full compensation to all owners of private property, it should be applauded.

The accomplishment of a street widening project in modern municipalities is a tremendously expensive affair. The inordinate cost incident to these improvements has long been a deterrent to their more rapid accomplishment. It is rare indeed that a street widening project is accomplished in which the general taxpayers are not required to bear at least fifty per cent of the expense. Consequently, the abutting property owner, who has the large benefit of the improvement, secures an increased value of his property, which is paid for from tax money. This increment in value inures to the benefit of the municipality, when land adjacent to the improvement is purchased and disposed of after the improvement is made. The original owner of the land is deprived of nothing except its speculative value incident to an improvement which is made at the expense of the taxpayers. He is paid the fair value of his property before the improvement is made. Whatever increment there is in the value is received by the taxpayers upon the subsequent sale of the property. To whom more appropriately should that increment go? A public improvement may be undertaken which, if this method be not available, could not be attempted, and the provision of the means for making a needed public improvement certainly constitutes a public purpose.

In the light of the foregoing discussion of the reasons for the use of excess condemnation, more immediate consideration of the application of the 14th Amendment of the Constitution may be given.

The Constitution of the United States, as it is interpreted by this court, is a marvelous document. The wisdom of this court has given it a life and resiliency which, while steadfastly holding to the fundamental meaning, has enabled our fundamental law to meet the demands of a vastly different political, social and economic era than that in which it was drawn. This is particularly true of the due process clause. Practically every new principle of social and economic advancement must stand the test of the due process clause before the bar of this court.

In these cases there is being tested for the first time the validity of a principle which has been developed solely for the purpose of better accomplishing certain necessary public results. Before denying the right to use the methods here in question, this court will surely scrutinize with care the alleged constitutional rights of the respondents which are claimed here to be violated. Certainly where the people of eight sovereign states have proclaimed that this method should be adopted, this court should hesitate long before denying to these states the validity of their actions. The adoption of these constitutional amendments is a clear indication of an insistent and growing public feeling that excess condemnation is both necessary and proper. In the minds of the overwhelming majority of the people of these sovereign states a public purpose will be served. That public purpose has arisen by reason of material changes in our urban life. That this court is fully conscious of the obligation to recognize these changes in the application of the due process clause is clearly revealed in the language of Mr. Justice Sutherland, in the case of Euclid v. Ambler Realty Co., 272 U. S., p. 365, where, on page 386, he says:

> "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.
>
> In a changing world, it is impossible that it should be otherwise."

The exigencies of modern urban life demand greater latitude in making private property subservient to the general good than has been true in the past. The present is a clear example where that necessity exists.

This court has ever been ready to recognize the needs created by our changing civilization and has placed its stamp of validity upon many measures enacted in furtherance of the public welfare, which one hundred years ago would have been regarded as arbitrary and unreasonable. There is no need to restate here the instances in which measures adopted under the police power have been sustained. Private rights are everywhere being justifiably invaded in the interest of the public. The case cited above is but typical of these instances. Another is that of Thomas Cusack Co. v. Chicago, 242 U. S., 526. In both instances, property rights were taken away without compensation, but this court found justification in the larger public necessity. Surely as liberal a rule should be applied to the exercise of the sovereign power of eminent domain, for in its exercise full compensation is given for all property taken.

We have the solemn declaration of the people of Ohio that excess condemnation is a taking for a public purpose. That declaration will not be lightly disregarded. If this court accords to the state the latitude which it permitted the federal government in the case of Old Dominion Land Company v. United States, 269 U. S., 55, but one conclusion may be reached.

In the case of Rindge Co. v. Los Angeles County, 262 U. S., p. 700, Mr. Justice Sanford states on page 705:

> "The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this court, while enforcing the Fourteenth Amendment shall keep in view the diversity of such conditions and regard with great respect the judgment of state courts on what shall be deemed public uses in any state."

If the decision of the courts of the state be entitled to respect, surely the considered judgment of the people themselves, evidenced by the adoption of a constitutional amendment, should be highly regarded.

DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the court below renders mere lip service to the right of excess condemnation. The concluding sentence of the opinion is:

> "We do not hold that the provision of the state Constitution might not be validly enforced in a proper case, but that as applied by the city in these cases it violates the due process clause of the Constitution."

An analysis of the conclusion of the court makes clear that (1) excess condemnation on the "remnant theory" is restricted to those instances where the court may say, as a matter of law, that (a) the remnant cannot be improved by the owner in a manner commensurate with the improvement, and (b) the jury would be justified in finding that the value of the entire tract is the proper measure of damages; (2) the right to take additional property to join with remnants legitimately required is entirely denied; (3) the protective theory is not discussed; and (4) the recoupment theory is entirely denied. In such a crippled condition does this decision leave the provision of the Ohio Constitution that it would be scarcely recognized by those who fostered it.

Under the conclusion of the lower court, every instance in which excess condemnation is attempted raises a justiciable question and the courts must determine whether what is proposed to be taken "would be valuable and utilizable for purposes suitable to the location of the property" within the language of the court. (Rec., p. 106.) Nothing is left to the legislative arm. All right to effect economy in the expenditure of public funds by securing to the public the values which the public moneys have established is denied. It needs little foresight to see that the constitutional provision, thus hamstrung, will be of no practical value to Ohio municipalities.

CONCLUSION.

Constitutional provisions in seven states other than Ohio are indirectly here involved. These constitutional provisions have been adopted solely in furtherance of the public welfare. If the lower court's decision remains undisputed, the right of excess condemnation, to all intents and purposes, is denied. The cases here involved are but typical instances in which the principles of excess condemnation should be applied and it is accordingly respectfully submitted that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,
GILBERT BETTMAN,
Attorney General.

L. F. LAYLIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 372, 373 and 374.—October Term, 1929.

The City of Cincinnati, Petitioner,
372 *vs.*
Margaret W. Vester.

The City of Cincinnati, Petitioner,
373 *vs.*
James S. Richards and Paschal L. Richards.

The City of Cincinnati, Petitioner,
374 *vs.*
Llewellyn B. Reakirt.

On Writs of Certiorari to the United States Circuit Court of Appeals of the Sixth Circuit.

[May 19, 1930.]

Mr. Chief Justice **Hughes** delivered the opinion of the Court.

These three cases were heard together. The suits were brought by owners of land in the City of Cincinnati to restrain the appropriation of their property by the City, upon the grounds that the taking was not in accordance with the applicable provisions of the constitution and statutes of Ohio and would constitute a deprivation of property without due process of law in violation of the Fourteenth Amendment, it being alleged that the appropriation was not for a public use. Under the law of Ohio these questions could be raised only by injunction proceedings. *P. C. C. & St. L. Railway Co.* v. *Greenville,* 69 O. S. 487, 496; *Sargent* v. *Cincinnati,* 110 O. S. 444. Decrees in favor of plaintiffs for a permanent injunction were entered in the District Court and were affirmed by the Circuit Court of Appeals. 33 F. (2d) 242. This Court granted writs of certiorari, 280 U. S. —.

The immediate purpose of the City of Cincinnati in the condemnation proceedings was the widening of Fifth Street, one of the principal thoroughfares of the City. A resolution of the City Council, passed July 6, 1927, declared its intention to appropriate for this purpose a strip of land 25 feet in width, adjacent to the south side of Fifth Street, and no question is raised as to the validity of the appropriation of this strip.

The controversy relates to what is known as "excess condemnation", that is, the taking of more land than is needed to be occupied by the improvement directly in contemplation. The constitution of Ohio provides (Article XVIII, Section 10):

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

In this instance, the City proposes to appropriate property in excess of that actually to be occupied by the widened street, and this excess condemnation embraces the following properties of the plaintiffs:

The Vester property. This is a lot, with a three story brick residence, on Broadway, a street intersecting Fifth Street. The lot is 27 feet wide by 90 feet deep running parallel to Fifth Street. It lies 44 feet south of Fifth Street and is thus 19 feet south of the 25-foot strip taken for the street widening. No part of this property is taken for the 25-foot strip or abuts on the widened street, and the entire lot is sought to be appropriated in the proceeding for excess condemnation. Between the Vester property and the 25-foot strip is the lot of another owner.

The Richards property. This is a leasehold of an improved lot 23 feet wide running from Fifth Street 100 feet through to Buchanan Street, which is parallel to Fifth Street on the south. It is held by the plaintiffs, Richards, with privilege of purchase. The north 25 feet of this lot is taken as a part of the strip for the widened street, and the remaining 75 feet to Buchanan Street is sought to be taken in excess condemnation.

The Reakirt property. This is a tract at the corner of Fifth Street and Sycamore Street (an intersecting street), 138 feet on the south side of Fifth Street and 149 feet on the west side of

Sycamore Street. The tract, which is vacant except for a small gasoline filling station, embraces several lots, two of which are not contiguous to the 25-foot strip.

Among the statutory provisions of Ohio relating to the condemnation of property by municipal corporations is the following with respect to the declaration of the purpose of the appropriation (General Code of Ohio, Section 3679):

"Sec. 3679. **Resolution shall be passed.** When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, defining the purpose of the appropriation, setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. For water-works purposes and for the purpose of creating reservoirs to provide for a supply of water, the council may appropriate such property as it may determine to be necessary".

The excess condemnation of the properties in question is proposed by the resolution adopted by the City Council, but the purpose of the appropriation is stated in the resolution only in the most general terms as being "in furtherance of the said widening of Fifth Street" and "necessary for the complete enjoyment and preservation of said public use." The ordinance providing for the excess appropriation was not more specific, declaring simply that it is "in furtherance of the public use", described as the widening of Fifth Street, and "for the more complete enjoyment and preservation of the benefits to accrue from said public use". In what way the excess condemnation of these properties was in furtherance of the widening of the street, and why it was necessary for the complete enjoyment and preservation of the public use of the widened street are not stated and are thus left to surmise.

The plaintiffs alleged in their bills of complaint that the excess condemnation is "a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement", and that the properties were taken "with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated." The answers of the City denied these allegations and summed up the position of the City by saying that the application of the principle of excess condemnation in these cases would enable the City (1) "to further the appropriate development of the south side of Fifth Street" by using or disposing of the excess properties in tracts "with such size and with such restrictions as will inure to the public advantage", and (2) that the increase in value of the properties in question which may accrue by reason of the improvement contemplated by the City "will pay in part the very heavy expense to which the City will be put in effecting the improvement".

On the hearing in the District Court, the plaintiffs and the defendant introduced evidence as to the condition and the value of plaintiffs' properties. There was also a stipulation of evidence as to the amount of money available for the street widening, the expense of the appropriation of the 25-foot strip, and the total expense of the entire proposed appropriation. The stipulation gave a general description of Fifth Street and of the improvements of the squares adjoining the widened street. None of the evidence defined in any specific manner the purpose of the excess condemnation.

The City argues that in resorting to excess condemnation legislative bodies generally have had in view the following three purposes (1) the avoidance of remnant lots, (2) the preservation and amplification of the improvement, and (3) the recoupment of expense from increased values. Both the District Court and the Circuit Court of Appeals concluded that the theory of remnants, and of the protection and preservation of the improvement, were not applicable to the present cases. Both courts considered that the sole purpose of the City was the recoupment by the resale of the properties in question of a large part of the expense of the street widening. In this view, both courts held that the excess condemnation was in violation of the constitutional rights of the plaintiffs upon the ground that it was not a taking for a public use "within the meaning of that term as it heretofore has been held to justify the taking of private property". The Circuit Court of Appeals added that the provision of the constitution of Ohio relating to excess condemnation, *supra*, "would seem to mean in furtherance of the normal use to which the property that is occupied by the improvement is devoted,—here the use and preservation of the street for the purposes of travel," and the court held that if the provision means that property may be taken "for the purpose of selling it at a profit and paying for the improvement it is clearly invalid."

In this Court, the City challenges the propriety of the assumption upon which these rulings below were based, that is, that the City was proceeding on the theory of the recoupment of expense by resale of the properties. While contending that this would be a valid purpose under the constitution of Ohio, and would constitute a taking for public use and therefore would be consistent with the Fourteenth Amendment, the City insists that its purpose in the present cases can not thus be delimited. The City calls attention to the general statements in the resolution and ordinance adopted by the City Council and declares that these broad declarations constitute "practically all the evidence which directly shows the purpose of the city". While reference is made to what is said in its pleadings with respect to its position, the argument for the City adds that "obviously an impersonality such as a city cannot very well testify as to what its plans and hopes are". The Court is asked to take judicial notice of certain desirable objects which the City might have in view. The City urges that, when the improvement is completed, the City Council will doubtless be in a position to determine what sized tracts and what kinds of restriction will be best suited for the harmonious development of the south side of Fifth Street. But the City also insists that it may never resell the excess; that it is not compelled to do so by the constitution; that the question is one to be determined in the future; that recoupment can come only from a sale, and that until by some act the City evidences an intent to sell it cannot be said to be proceeding only on a theory of recoupment. The City says that it may preserve the public use in many ways, and that sale with restrictions is one that may hereafter be chosen, but that there is no warrant upon this record for discarding every possible use in favor of a use by sale that may, among other things, result in a possible recoupment.

We are thus asked to sustain the excess appropriation in these cases upon the bare statements of the resolution and ordinance of the City Council, by considering hypothetically every possible, but undefined, use to which the City may put these properties, and by determining that such use will not be repugnant to the rights secured to the property owners by the Fourteenth Amendment. We are thus either to assume that whatever the City, entirely uncontrolled by any specific statement of its purpose, may decide to do with the properties appropriated, will be valid under both the state and Federal constitutions, or to set up some hypothesis as to use and decide for or against the taking accordingly, although the assumption may be found to be foreign to the actual purpose of the appropriation as ultimately disclosed and the appropriation may thus be sustained or defeated through a misconception of fact.

It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.[1] In the present instance, we have no legislative declaration, apart from the statement of the City Council, and no judgment of the state court as to the particular matter before us. Under the provision of the constitution of Ohio for excess condemnation when a city acquires property for public use, it would seem to be clear that a mere statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted.

To the end that the taking shall be shown to be within its authority, the municipality is called upon to specify definitely the purpose of the appropriation. This is the clear import of the provision of the Ohio statute (Ohio General Code, sec. 3679, *supra*) that the City Council, when it is deemed necessary to appropriate property, shall pass a resolution "defining the purpose of the appropriation". It can not be said that this legislative requirement relates only to the principal appropriation and not to the excess appropriation. It must be deemed to apply, according to its express terms, to every appropriation of private property by a municipality. The importance of the definition of purpose would be even greater in the case of taking property not directly to be occupied by a proposed public improvement than in the case of the latter which might more clearly speak for itself.

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[1] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 159; Missouri Pacific Ry. Co. *v.* Nebraska, 164 U. S. 403, 417; Madisonville Traction Co. *v.* Saint Bernard Mining Co., 196 U. S. 239, 252: Clark *v.* Nash, 198 U. S. 361, 369; Strickley *v.* Highland Boy Mining Co., 200 U. S. 527, 531; Hairston *v.* Danville & Western Ry. Co., 208 U. S. 598, 606; Sears *v.* City of Akron, 246 U. S. 242, 251; Rindge Company *v.* County of Los Angeles, 262 U. S. 700, 705; Old Dominion Land Co. *v.* United States, 269 U. S. 55, 66.

The general declaration of the resolution of the City Council, and of the ordinance if that may be read with the resolution, for the excess condemnation in the present cases, is plainly not a definition. To define is to limit, and that which is left unlimited, and is to be determined only by such future action as the City may hereafter decide upon, is not defined. The City's contention is so broad that it defeats itself. It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation. Under the guise of an excess condemnation pursuant to the authority of the constitutional provision of Ohio, private property could not be taken for some independent and undisclosed public use. Either no definition of purpose is required in the case of excess condemnation, a view of the statute which cannot be entertained, or the purpose of the excess condemnation must be suitably defined. In this view, in the absence of such a definition, the appropriation must fail by reason of non-compliance with statutory authority.

We understand it to be the rule in Ohio, as elsewhere, that the power conferred upon a municipal corporation to take private property for public use must be strictly followed. *Harbeck* v. *Toledo,* 11 Ohio St. 219, 222, 223; *Grant* v. *Village of Hyde Park,* 67 Ohio St. 166, 172, 173; *Farber* v. *Toledo,* 104 Ohio St. 196, 200; *Roosevelt Hotel Building Company* v. *Cleveland,* 25 Ohio App. 53, 63, 64. The validity of the excess condemnation upon the ground of non-compliance with the state law was challenged in the bills of complaint in these suits. The respondents have made the same contention here. The City has not met it by referring us to any decision of the courts of Ohio construing the statute involved or sustaining the excess appropriation in the absence of a definition of purpose. It is an established principle governing the exercise of the jurisdiction of this Court, that it will not decide important constitutional questions unnecessarily or hypothetically. *Liverpool, New York & Philadelphia Steamship Company* v. *Commissioners of Emigration,* 113 U. S. 33, 39; *Siler* v. *Louisville & Nashville Railroad Company,* 213 U. S. 175, 191, 193; *United States* v. *Delaware & Hudson Company,* 213 U. S. 366, 407. The present cases call for the application of this principle. Questions relating to the constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose, the object of the excess appropriation not being set forth as required by the local law.

We conclude that the proceedings for excess condemnation of the properties involved in these suits were not taken in conformity with the applicable law of the State, and in affirming the decrees below upon this ground we refrain from expressing an opinion upon the other questions that have been argued.

Decrees affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.